Supreme Court
FILED
APR 30 2003
OFFICE OF THE CLERK

No. 02-1590

In The

Supreme Court of the United States

MOUNTAIN STATES LEGAL FOUNDATION and THE BLUE RIBBON COALITION, INC.,

Petitioners,

v.

GEORGE W. BUSH, President of the United States; THE WILDERNESS SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; SODA MOUNTAIN WILDERNESS COUNCIL; and NATIONAL WILDLIFE FEDERATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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135 pp

ISSUES PRESENTED

1. Whether judicial review is available to enforce the limitations on presidential authority contained in the Antiquities Act?

2. Whether the courts below abdicated their responsibility to determine whether statutory restrictions have been violated?

LIST OF PARTIES

The following parties were Plaintiffs at the U.S. District Court and Appellants before the U.S. Court of Appeals for the District of Columbia Circuit: Mountain States Legal Foundation and The Blue Ribbon Coalition, Inc. (hereinafter collectively "MSLF"). The following party was Defendant at the U.S. District Court and Appellee before the U.S. Court of Appeals for the District of Columbia Circuit: George W. Bush, President of the United States. The following parties were Defendants-Intervenors at the U.S. District Court and Appellees-Intervenors before the U.S. Court of Appeals for the District of Columbia Circuit: The Wilderness Society; Natural Resources Defense Council; Sierra Club; Soda Mountain Wilderness Council; and National Wildlife Federation.

CORPORATE DISCLOSURE STATEMENT

No publicly-held company holds a 10% or greater ownership interest in Mountain States Legal Foundation or Blue Ribbon Coalition, nor does either of these entities have parent companies.

STATEMENT OF RELATED CASES

Petitioners are unaware of any related cases that either are pending review or were reviewed previously by this Court. However, *Tulare County, et al. v. Bush, et al.*, 306 F.3d 1138 (D.C. Cir. 2002), involves similar parties and substantially the same or similar issues. A copy of the opinion in *Tulare County* is included in the Appendix at App. 98-107.

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OPINIONS BELOW

Review is sought of the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, *Mountain States Legal Foundation, et al. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), which was issued on October 18, 2002, and is reproduced at App. 1-15. The order and transcript of hearing of the United States District Court for the District of Columbia, *Mountain States Legal Foundation, et al. v. Bush*, Civil Action No. 00-2072 (D.D.C. 2001), appears at App. 16-31.

JURISDICTION

The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Property Clause, Article IV, Section 3, Clause 2, of the United States Constitution is involved in this Petition for *Writ* of *Certiorari*. U.S. Const., art. IV, sec. 3, cl. 2 (App. 34).

STATUTE INVOLVED

This Petition involves the Antiquities Act, 16 U.S.C. § 431 (App. 34).

STATEMENT OF THE CASE

On January 26, 2001, MSLF filed a complaint on behalf of its members challenging, as violations of the Property Clause, President William Jefferson Clinton's creation by proclamation of the six national monuments at issue.[1] App. 35.

On March 26, 2001, Defendant and Intervenors filed separate motions to dismiss, alleging that the Defendant acted pursuant to authority provided by the Antiquities Act of 1906, 16 U.S.C. § 431. MSLF responded on April 16, 2001, arguing that the President's actions in creating the challenged monuments were *ultra vires*, that is, outside the scope of the President's authority as delegated by Congress in the Antiquities Act.

On November 15, 2001, the District Court, ruling from the bench, granted the motions, holding that the Court lacked jurisdiction to review the President's actions beyond the face of the challenged proclamations. App. 27-28. On November 27, 2001, MSLF timely filed its Notice of Appeal to the U.S. Court of Appeals for the D.C. Circuit.

On October 18, 2002, the D.C. Circuit affirmed the dismissal of MSLF's complaint. *Mountain States Legal Foundation, et al. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002). App. 13. The D.C. Circuit held that, although substantive judicial review of the President's compliance with the Antiquities Act is generally available, MSLF failed to state

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[1] In accordance with Fed. R. Civ. P. 25(d)(1), President George W. Bush was substituted as the sole named Defendant.

factual allegations sufficient to warrant review of its *ultra vires* claims. App. 9-11.

On that same day, the same panel of the D.C. Circuit issued a related decision in *Tulare County, et al. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), App. 98, affirming the dismissal of Tulare County's complaint challenging President Clinton's designation of the Giant Sequoia National Monument in south-central California in April 2000. Relying on *Mountain States Legal Foundation v. Bush*, the panel held that "at no point" in its 215-paragraph complaint did Tulare County present factual allegations that would warrant *ultra vires* review of the challenged proclamation. *Tulare County*, 306 F.3d at 1144, App. 107.

On November 28, 2002, MSLF petitioned for *en banc* review, which the D.C. Circuit denied on January 30, 2003. App. 32-33.

STATEMENT OF FACTS

On January 11, 2000, President William Jefferson Clinton signed and issued Presidential Proclamation 7265, proclaiming the establishment of the Grand Canyon-Parashant National Monument. Proclamation 7265 purports to withdraw and reserve an area of 1,014,000 acres north of Grand Canyon National Park in northwest Arizona, 75 miles northwest of Flagstaff, Arizona. 65 *Fed. Reg.* 2825 (January 18, 2000), App. 56.

On June 9, 2000, President Clinton signed and issued four consecutive Proclamations, numbered 7317 though 7320, establishing four additional national monuments in the States of Colorado, Oregon, Washington, and Arizona.

Proclamation 7317, entitled "Establishment of the Canyons of the Ancients National Monument," purports to withdraw and reserve an area of 164,000 acres in the Four Corners region of southwestern Colorado, 45 miles west of Durango, Colorado. 65 *Fed. Reg.* 37,243 (June 13, 2000), App. 65. Proclamation 7318, entitled "Establishment of the Cascade-Siskiyou National Monument," purports to withdraw and reserve an area of 52,000 acres at the convergence of the Klamath and Cascade Mountains in southwestern Oregon, 25 miles southeast of Medford, Oregon. 65 *Fed. Reg.* 37,249 (June 13, 2000), App. 72. Proclamation 7319, entitled "Establishment of the Hanford Reach National Monument," purports to withdraw and reserve an area of 195,000 acres along the Columbia River in south-central Washington, within the borders of the Department of Energy's (DOE) Hanford Nuclear Reservation. 65 *Fed. Reg.* 37,253 (June 13, 2000), App. 78. Proclamation 7320, entitled "Establishment of the Ironwood Forest National Monument," purports to withdraw and reserve an area of 129,000 acres about 25 miles northwest of Tucson in southern Arizona. 65 *Fed. Reg.* 37,259 (June 13, 2000), App. 85.

On January 17, 2001, President Clinton signed and issued Proclamation 7397, establishing the Sonoran Desert National Monument and purporting to withdraw and reserve an area of 486,149 acres about 60 miles from Phoenix in southern Arizona. 66 *Fed. Reg.* 7354 (January 22, 2001), App. 90.

Each of these Proclamations purports to set apart and to reserve all lands and interests in lands owned or controlled by the United States within the boundaries of the areas described by a map attached to and forming part of each Proclamation. App. 62, 69, 74, 82, 87-88, 94. Each of

these Proclamations, whether or not a valid exercise of constitutional authority by the President, has the immediate *de facto* effect of withdrawing and reserving the lands described therein.

Each of the proclamations directs that the reserved area be managed as a national monument. App. 63, 70, 76, 83, 87, 94. The proclamations effect a withdrawal of the reserved lands from all entry, location, selection, sale or other disposition under the public land laws, including the mining laws and laws relating to mineral and geothermal leasing. App. 63, 69, 75, 82, 88, 94-95. The proclamations also prohibit all non-emergency off-road use of motorized and mechanized vehicles in the reserved areas. App. 62, 69, 76, 82, 88, 94. Proclamations 7318 and 7319 reserve a quantity of water "sufficient to fulfill the purposes for which this monument was established." App. 75, 82-83. Proclamations 7319 and 7397 prohibit grazing in the reserved areas. App. 83, 96. Proclamations 7265 and 7318 specifically prohibit the commercial harvest of timber. App. 63, 75. Each of the proclamations directs that additional specific management actions be taken to protect the objects and resources included in the monument area. App. 56-97.

MSLF and the Blue Ribbon Coalition ("BRC") are not-for-profit, public interest organizations with members throughout the United States, but particularly in the western states, including Arizona, Colorado, Oregon, and Washington. App. 37-38, 41-42. Their members have in the past used, and have concrete plans for the future to use, each of the six areas at issue in this case for a variety of purposes including, but not limited to, prospecting for minerals, exploring for and mining for ore bodies, exploring for and drilling for oil and gas deposits, hunting,

fishing, camping or otherwise recreating, grazing livestock, harvesting timber, utilizing access to repair, upgrade, or replace power transmission lines and facilities, obtaining access to private property or state-owned property, maintaining equipment and water lines, and other lawful uses. App. 38, 42. As a result of the designation of the challenged monuments, members of MSLF and BRC who formerly pursued these lawful uses of the public lands at issue are no longer permitted to pursue such activities on those lands. App. 38, 42.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE D.C. CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS BY THIS COURT.

A. The D.C. Circuit's Decision Conflicts With Holdings Of This Court Regarding The Notice Pleading Requirements Of The Federal Rules Of Civil Procedure.

1. MSLF's complaint provided "fair notice" of the basis of MSLF's claims.

The panel agreed with MSLF that substantive judicial review is generally available to ensure that the President has not exceeded his statutory authority under the Antiquities Act. *Mountain States*, 306 F.3d at 1136; App. 9. The panel concluded, however, that MSLF's allegations that the President acted "*ultra vires*" in designating the challenged monuments were insufficient to support its *ultra vires* claim. *Id.* at 1136-37; App. 9. The panel, therefore, held that "[t]he inadequacy of Mountain States' assertions thus precludes it from showing that the district court

erred in declining to engage in a factual inquiry to ensure that the President has complied with the statutory standards." *Id.* at 1137; App. 11.

In its complaint, MSLF described in detail each of the proclamations designating the challenged national monuments and clearly asserted that the President acted *ultra vires* in issuing each of the proclamations. App. 36-37, 44-54. Nevertheless, the panel held that MSLF had failed to allege "any facts" sufficient to warrant review of its *ultra vires* claim. *Mountain States*, 306 F.3d at 1133; App. 9.

This Court's familiar authority holds that "a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added):

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Id. at 47 (quoting Fed. R. Civ. P. 8(a)).[2] In *Conley*, this Court reversed the dismissal of the plaintiff's complaint where the complaint "gave the respondents fair notice of

[2] Rule 8 further provides that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required," and that "[a]ll pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(e)(1), (f).

its basis." *Id.* at 48; *see also, Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (same).

In this case, it is clear that both the President and the District Court were fully aware of both the factual basis and the legal substance of MSLF's claims. Here, as in *Conley*, the record establishes that the President had "fair notice of [the] basis" of MSLF's claims. The President promptly filed a responsive pleading to MSLF's *ultra vires* claim by asserting the Antiquities Act as authority for the President's actions.[3] Clearly, the President was on notice that MSLF challenged the legality of his creation, by proclamation, of the national monuments described in the complaint.[4] Therefore, because MSLF's complaint is not "so vague or ambiguous that [the President] cannot reasonably be expected to frame a responsive pleading," the complaint satisfies both the requirements of Rule 8 and the holdings of this Court. Fed. R. Civ. P. 12(e); *see United States v. SCRAP*, 412 U.S. 669, 689-690 n. 15 (1973).

In fact, the President and Intervenors repeatedly acknowledged in their briefs that MSLF plead an *ultra vires* claim based on the President's creation of the

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[3] Thus, as this Court has held, the District Court had jurisdiction to review MSLF's claims because they related to a statutory issue raised as an affirmative defense. Fed. R. Civ. P. 8(c); *see*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

[4] "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). The President filed no such motion before responding to MSLF's complaint, thereby implicitly admitting that he had "fair notice" of MSLF's "claim[s] . . . and the grounds upon which [they] rest[ ]."

challenged monuments. Brief for President on appeal at 2, 10, 12-13; Brief for Intervenors on appeal at 2, 4, 17. Moreover, both the President and Intervenors were capable of defending and did, in fact, vigorously defend the President's creation of the challenged monuments pursuant to the Antiquities Act in the District Court and before the D.C. Circuit. As in *United States v. SCRAP*, "if [the lack of specificity] were really a problem, the [defendants] could have moved for a more definite statement[ ] and certainly normal civil discovery devices were available to the [defendants]." *SCRAP*, 412 U.S. at 689-690 n. 15 (internal citation omitted). Obviously, no such motion was necessary.

Nor was the District Court confused regarding the substance of this case. *See*, District Court Transcript at 47, 48; App. 18-19 (describing MSLF's complaint "challenging the President's Proclamations creating National Monuments in six areas of land under the Antiquities Act of 1906" and acknowledging MSLF's argument that the President acted *ultra vires*).[5] Because all parties had "fair notice of [the] basis" of MSLF's claims, MSLF's complaint satisfies the standard of notice pleading. *Conley*, 355 U.S. at 48.

[5] Thus, the District Court implicitly recognized that "fair notice" was provided by MSLF's complaint.

2. The D.C. Circuit imposed a heightened pleading standard in conflict with decisions of this Court.

A "simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment" is an accurate measure of compliance with Rule 8's notice pleading standard. C. Wright & A. Miller, 5 *Federal Practice & Procedure* § 1219 (1969). MSLF's complaint contains a "simple statement in sequence of the events which have transpired," *see* Complaint ¶¶ 36-80, App. 44-50, and "a direct claim by way of demand for judgment," *see* Complaint, Demand for Relief, App. 54-55. Therefore, MSLF's complaint properly complies with Rule 8.

"Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 48.[6] Under notice pleading, "discovery itself is designed to help define and clarify the issues." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see also, Leatherman v. Tarrant Co. Narc. Intell. and Coord. Unit*, 507 U.S. 163, 168-169 (1993).

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[6] The "other pretrial procedures established by the Rules" to which this Court referred in *Conley* include: Rule 12(e) (motion for a more definite statement); Rule 12(f) (motion to strike portions of the pleadings); Rule 12(c) (motion for judgment on the pleadings); Rule 16 (pretrial procedure and formulation of issue); Rules 26-37 (depositions and discovery); Rule 56 (motion for summary judgment); and Rule 15 (right to amend). *Conley*, 355 U.S. at 48 n. 9.

In *Tulare County*, the D.C. Circuit issued an Order denying rehearing *en banc* that included a *per curiam* Statement of the Panel in which the D.C. Circuit elaborated on what would constitute factual allegations of "sufficient particularity." App. 108-109. The D.C. Circuit expressed that it had affirmed the dismissal of Tulare County's complaint because the County had failed to allege, in the 215 allegations contained in its complaint, specific portions of the monument area that lacked scientific or historic value. App. 109. In the D.C. Circuit's mistaken view, it was not enough that Tulare County had alleged that such areas existed. Moreover, even the specific factual allegation that "Sequoia groves comprise only six percent of the [Giant Sequoia National] Monument" was not sufficient for the D.C. Circuit. App. 109. Instead, the D.C. Circuit erroneously asserted that it was "incumbent" upon Tulare County to allege some specific area of the Monument that did not contain the natural resources that the President sought to protect. App. 109.

This holding reveals that what the D.C. Circuit sought in MSLF's complaint, as well as in Tulare County's complaint, were specific facts that were contained in the records of the monument designations, that is, documents in the possession, custody, and control of the Defendant. However, because these documents are available to MSLF only through discovery, the D.C. Circuit failed to apply notice pleading standards, which rely on "liberal" discovery to enable the parties to provide such facts. *Conley*, 355 U.S. at 48; *Oppenheimer*, 437 U.S. at 351.

Furthermore, the D.C. Circuit erroneously applied a heightened pleading standard because judicial review was sought of presidential action "under a statute that confers very broad discretion" and where "separation of powers

concerns are presented." *MSLF v. Bush*, 306 F.3d at 1137, App. 10-11. But "Rule 8(a)'s simplified notice pleading standard applies to *all* civil actions." *Swierkiewicz*, 534 U.S. at 513 (emphasis added). Although Rule 9(b) contains limited exceptions to notice pleading for averments of fraud or mistake, "[t]his Court[ ] has declined to extend such exceptions to other contexts." *Id.* The Federal Rules "do not include among the enumerated [exceptions] any reference to complaints [where separation of powers concerns are presented];" thus, "complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a)." *Id.*

The D.C. Circuit also held that, although MSLF had alleged that the President's actions were *ultra vires*, MSLF's arguments "present no more than legal conclusions." *MSLF v. Bush*, 306 F.3d at 1137, App. 10. But this Court rejected such an argument in *Swierkiewicz* where the defendant had argued that lawsuits based on "conclusory allegations" of discrimination must not be allowed to go forward because it would "burden the courts" and encourage "unsubstantiated suits." *Swierkiewicz*, 534 U.S. at 514. In fact, this Court has eschewed consistently the imposition of heightened pleading standards in order to alleviate crowded court dockets or dispose quickly of difficult issues. *Leatherman*, 507 U.S. at 168.

The issue presented by a motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Indeed, even if "it may appear on the face of the pleadings that a recovery is very remote and unlikely[,] that is not the test." *Swierkiewicz*, 534 U.S. at 515.

In *Swierkiewicz*, this Court rejected the Second Circuit's attempt to apply a heightened pleading standard to the plaintiff's employment discrimination claims. *Id.* at 511. This Court held that requiring "greater particularity" in Title VII cases conflicted with Rule 8 and would "too narrowly constrict the role of the pleadings." *Id.*; *see also*, *Leatherman*, 507 U.S. at 168 (rejecting heightened pleading standard for § 1983 cases).

This Court further described the judicial process that is available "in all civil actions," including this case:

> The liberal notice pleading of Rule 8(a) is the starting point of a simplified system, which was adopted to focus litigation on the merits of a claim. . . . The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.

Swierkiewicz, 534 U.S. at 513-14; *accord*, *Leatherman*, 507 U.S. at 168-69. Any requirement of greater specificity for particular claims "is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz*, 534 U.S. at 515. Accordingly, the D.C. Circuit's application of a heightened pleading standard is in direct conflict with *Swierkiewicz* and *Leatherman*.

MSLF need not allege all the facts necessary to prove its claim so long as it provided enough factual information to make clear the substance of its claim. *Conley*, 355 U.S. at 47. Where "[t]he gist of [MSLF's] cause of action has been clear from the outset," MSLF's complaint must "be so

construed as to do substantial justice." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968) (*rev'd on other grounds*). Because the record reveals that MSLF provided enough factual information to afford the President, the Intervenors, and the District Court no doubt as to the substance of its claims, the decision of the D.C. Circuit is in direct conflict with the decisions of this Court regarding the notice pleading requirements of Rule 8.

Because the D.C. Circuit's decision conflicts with this Court's decisions, this Court should grant this Petition.

B. The D.C. Circuit's Decision Conflicts With Decisions Of This Court Regarding The Obligation Of The Courts To Determine Whether Statutory Restrictions Have Been Violated.

The D.C. Circuit recognized that "the responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress" and that "Courts remain obligated to determine whether statutory restrictions have been violated." *MSLF v. Bush*, 306 F.3d at 1136, App. 8-9; *see also*, *Tulare County*, 306 F.3d at 1141, App. 101. Nevertheless, the D.C. Circuit completely disregarded this judicial obligation by failing to remand this case to the District Court for proceedings consistent with this obligation.

This Court has recognized repeatedly that it is the responsibility of the courts to conduct review of executive action for compliance with statutory limitations on authority. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986); *Leedom v. Kyne*, 358 U.S. 184, 188-90

(1958); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Accordingly, there is a general presumption of judicial reviewability of executive action, a remedy that is particularly necessary when one is injured by an act of a government official allegedly in excess of his express or implied powers. *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958). Courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive[ ] violates such a command." *Bowen*, 476 U.S. at 681.

In *McAnnulty*, the plaintiff sought an injunction to restrain a subordinate official from carrying out an order of the Postmaster General. *McAnnulty*, 187 U.S. at 102. This Court explained that the:

> acts of all [executive] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. . . . Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.

Id. at 108.

This Court employed similar reasoning in *Stark*, in which the Court considered a complaint seeking to enjoin the Secretary of Agriculture from allegedly exceeding his statutory authority. *Stark*, 321 U.S. at 289, 304, 309. This Court reversed the dismissal of that complaint, holding that the plaintiffs had demonstrated "a right to judicial

examination of their complaint" because "[t]he responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id.* at 310-11.

In *Leedom*, 358 U.S. at 188-90, even though judicial review was precluded implicitly by the review provisions of the National Labor Relations Act, this Court upheld district court jurisdiction where the National Labor Relations Board attempted to exercise power that had been specifically withheld. "[B]ut for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act." *Id.* at 190. Here, as in *Leedom*, abdication of the judicial responsibility to enforce statutory limitations "rob[s] the [Antiquities] Act of its vitality and thwart[s] its purpose." *Id.*

Therefore, even when the president is acting pursuant to a statute that grants him broad discretion, such as the Antiquities Act, the courts may not shirk their duty to ensure that the president has acted in full compliance with the legislative commands contained in the statute. *Bowen*, 476 U.S. at 681; *Leedom*, 358 U.S. at 190. Moreover, this duty is so compelling that this Court has held that the presumption of judicial reviewability of executive action may control even where such review is prohibited by statute. *Leedom*, 358 U.S. at 188. Accordingly, the D.C. Circuit's decision not to remand this case to the District Court for substantive judicial review is in conflict with this Court's decisions regarding the judicial obligation to enforce statutory limitations.

This Petition should be granted to resolve this conflict.

II. THIS CASE IS OF EXCEPTIONAL NATIONAL IMPORTANCE.

The challenged presidential actions affect the management of over two million acres of federal lands in western states, including the ability to manage to prevent disastrous forest fires. The devastating forest fires of the spring and summer of 2002, which burned millions of acres, demonstrated to the nation the dangerous condition of much of the nation's federal lands. Those states suffering the most destruction were Arizona, Oregon, and Colorado, where the challenged proclamations have subjected nearly two million acres of federal land to wilderness management protocols, including specific prohibitions on timber harvest. With drought conditions persisting in these western states and other areas of the country, these issues will remain of vital national concern.

Furthermore, it is the responsibility of the courts to determine whether statutory restrictions have been violated and to enforce the limits of statutory grants of authority such as those contained in the Antiquities Act. Together, the decisions in *MSLF v. Bush* and *Tulare County* ensure that these exceptionally important matters will not receive the judicial review to which they are entitled. This Court must not allow the lower courts to abdicate that responsibility with regard to these issues of critical national importance on federal lands.

CONCLUSION

For all of the above reasons, this Court should grant this Petition.

Respectfully submitted,

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Attorneys for Petitioners

Dated: April 30, 2003

306 F.3d 1132

United States Court of Appeals,
District of Columbia Circuit.

MOUNTAIN STATES LEGAL FOUNDATION
and the Blue Ribbon Coalition, Inc.,
Appellants,
v.
George W. BUSH, in his official capacity as
President of the United States of
America, et al., Appellees.

No. 01-5421.

Argued Sept. 3, 2002.
Decided Oct. 18, 2002.
Rehearing En Banc Denied Jan. 30, 2003.

S. Amanda Koehler argued the cause for appellants. With her on the briefs was William Perry Pendley.

Susan Pacholski, Attorney, U.S. Department of Justice, argued the cause for appellee George W. Bush. With her on the brief were Ellen Durkee, Michael Gheleta and Ann D. Navaro, Attorneys.

James S. Angell argued the cause for appellees Wilderness Society, et al. With him on the brief was Johanna Wald.

Before: EDWARDS and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

Mountain States Legal Foundation and the Blue Ribbon Coalition (hereafter "Mountain States") appeal the dismissal of their complaint challenging six Presidential

Proclamations as unconstitutional and *ultra vires* actions for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mountain States contends that the district court erred by limiting its review to the face of the Proclamations rather than conducting factfinding to determine whether the President had complied with the limitations, structure, and purposes of the Antiquities Act ("the Act"), 16 U.S.C. § 431 (2000). Absent such judicial review, it contends, the Act constitutes an unconstitutional delegation of congressional authority. Mountain States maintains that its complaint stated a claim because the Proclamations reach far beyond the purpose, scope, and size of any national monuments contemplated by Congress under the Act and are contrary to various statutes relating to the protection of environmental values on federal land. We have no occasion to decide the availability or scope of judicial review of a Presidential Proclamation designating federal lands as a national monument under the Antiquities Act, for Mountain States has failed to present any factual allegation sufficient to warrant review of its *ultra vires* claim. Accordingly, we affirm the dismissal of the complaint.

I.

Near the end of his second term in office, President Clinton exercised his authority under the Antiquities Act to issue a series of Presidential Proclamations designating a handful of national monuments in the western United States. Among these designations are the six Proclamations that Mountain States challenged in its complaint: (1) the Grand Canyon-Parashant National Monument, a

"geological treasure" that encompasses an important watershed for the Colorado River and the Grand Canyon in northwest Arizona, Proclamation No. 7265, 65 Fed. Reg. 2825, 2825-26 (Jan. 18, 2000); (2) the Canyons of the Ancients National Monument in southwest Colorado, a "rugged landscape" containing "the highest known density of archaeological sites in the Nation," Proclamation No. 7317, 65 Fed. Reg. 37,243 (June 13, 2000); (3) the Cascade-Siskiyou National Monument, a "biological crossroads" in southwestern Oregon where the Cascade Range intersects with adjacent ecoregions, Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 13, 2000); (4) the Hanford Reach National Monument, a habitat in southern Washington that is the largest remnant of the shrub-steppe ecosystem that once dominated the Columbia River basin, Proclamation No. 7319, 65 Fed. Reg. 37,253 (June 13, 2000); (5) the Ironwood Forest National Monument, an arid terrain in southern Arizona marked by rock art sites and other archaeological objects of scientific interest, Proclamation No. 7320, 65 Fed. Reg. 37,259 (June 13, 2000); and (6) the Sonoran Desert National Monument, a desert ecosystem containing an array of biological, scientific, and historic resources, Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 22, 2001).

Mountain States alleged in its complaint that the President acted unconstitutionally and *ultra vires* under the Property Clause, U.S. Const., art. IV, § 3, cl. 2, in issuing these Proclamations. In the district court Mountain States argued that the President lacked the authority to designate the monuments because the Property Clause confers on Congress all powers relating to federal land. The focus of its argument shifted, however, when the government invoked the Antiquities Act in its motion to

dismiss the complaint under Rule 12(b)(1) and (b)(6). The government argued that because the President had issued the Proclamations under the Antiquities Act, judicial review was limited to whether the President exercised his discretion in accordance with the standards in the Act, and that review of the face of the Proclamations sufficed to dispose of Mountain States' arguments. Mountain States responded that factfinding was required to ensure that the President had acted within the scope of his statutory authority, and in particular that the court should review, in light of the statutory standards, the basis on which the President acted. According to Mountain States, Congress intended only to preserve ruins, artifacts, and other manmade objects situated on public lands – not the land itself – by the smallest possible reservation of public land necessary for protection of the monument.

The district court dismissed the complaint, ruling that the Property Clause was not at issue and that under the Antiquities Act only facial review of Mountain States' arguments was appropriate. Upon facial review, the court concluded that the President had referenced the relevant statutory standards and had not acted *ultra vires*.

II.

On appeal, Mountain States contends that, in light of the presumption of judicial reviewability of executive action, substantive review was required to ensure that substantial evidence existed to support the President's issuance of the Proclamations. Arguing that the Proclamations' nature, size, and scope facially contravene Congress's limited purpose, which was to preserve rare and discrete man-made objects, such as prehistoric ruins and

ancient artifacts, Mountain States further contends that the Presidential actions violate other statutes governing the withdrawal of land from public use and the protection of environmental values on federal land. Hence, Mountain States maintains, the district court erred in dismissing its complaint based only on facial review of the Proclamations.

Our review of the grant of a motion to dismiss is *de novo*. *Wilson v. Pena,* 79 F.3d 154, 160 n. 1 (D.C.Cir.1996). In ruling on a motion to dismiss a complaint the district court must draw all reasonable inferences in favor of the plaintiff, *Maljack Prods., Inc. v. Motion Picture Ass'n of Am., Inc.,* 52 F.3d 373, 374 (D.C.Cir.1995), and must not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). Despite Federal Rule of Civil Procedure 8's simplified notice pleading standard, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C.Cir.1994). With this standard in mind, we turn to Mountain States' contentions.

A.

The Antiquities Act provides, in relevant part:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific

> interest that are situated upon lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. . . .

16 U.S.C. § 431. Presidential Proclamations designating national monuments have been challenged in only a handful of cases; in each the court has upheld the President's action.[1] The Supreme Court has considered the Antiquities Act in three cases, each time confirming the broad power delegated to the President under the Act. *United States v. California,* 436 U.S. 32, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978); *Cappaert u. United States,* 426 U.S. 128, 141-42, 96 S.Ct. 2062, 2071, 48 L.Ed.2d 523 (1976); *Cameron v. United States,* 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659 (1920).

Although the Supreme Court has never expressly discussed the scope of judicial review under the Antiquities Act, the Court has directly addressed the nature of review of discretionary Presidential decisionmaking under other statutes. The Court has highlighted the separation

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[1] *See Anaconda Copper Co. v. Andrus,* 14 Env't Rep. Cas. (BNA) 1853, 1855 (D.Alaska July 1, 1980) (President Carter's creation of monuments in Alaska); *Wyoming v. Franke,* 58 F.Supp. 890, 896 (D.Wyo.1945) (President Franklin Delano Roosevelt's designation of the Jackson Hole National Monument); *cf. Alaska v. Carter,* 462 F.Supp. 1155, 1159-60 (D.Alaska 1978) (holding that President is not subject to environmental impact statement requirements when proclaiming monuments under the Antiquities Act). See also *Tulare County v. Bush,* 306 F.3d at 1138 (D.C.Cir.2002), also decided today.

of powers concerns that inhere in such circumstances and has cautioned that these concerns bar review for abuse of discretion altogether. *United States v. George S. Bush & Co.,* for example, involved § 336(c) of the Tariff Act of 1930, which provided that the President:

> shall by proclamation approve rates of duties and changes in classification and in basis of value specified in any report of the [Tariff] [C]ommission . . . if *in his judgment* such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

310 U.S. 371, 376-77, 60 S.Ct. 944, 944-45, 84 L.Ed. 1259 (1940) (quoting 19 U.S.C. § 1336(a)) (emphasis added). The statute provided for judicial review only of legal questions. The Court held that "[t]he President's method of solving the problem [of foreign exchange value] was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us." *Id.* at 379, 60 S.Ct. at 946. Similarly, in *Dalton v. Specter,* the Court considered a statute – the Defense Base Closure and Realignment Act of 1990 – that did "not at all limit the President's discretion. . . . " 511 U.S. 462, 476, 114 S.Ct. 1719, 1728, 128 L.Ed.2d 497 (1994). Judicial review was unavailable under the Administrative Procedures Act ("APA") because the President is not an "agency" within the meaning of that statute. *Id.* at 469-70, 114 S.Ct. at 1724-25 (citing *Franklin v. Massachusetts,* 505 U.S. 788, 800-01, 112 S.Ct. 2767, 2775-76, 120 L.Ed.2d 636 (1992)). The Court then "assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA," *id.* at 474, 114 S.Ct. at 1727 (citation omitted), but it reiterated that "such review

is not available when the statute commits the decision to the discretion of the President." *Id.* The Court held, "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for our review." *Id.* at 476, 114 S.Ct. at 1726.

A somewhat different case is presented, however, where the authorizing statute or another statute places discernible limits on the President's discretion. Judicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did "not at all limit" the discretion of the President. *Id.* at 476, 114 S.Ct. at 1726; *cf. California,* 436 U.S. at 33, 98 S.Ct. at 1662-63. As this court observed in *Chamber of Commerce v. Reich,* "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." 74 F.3d 1322, 1331 (D.C.Cir.1996) (footnote omitted). "*Dalton* is inapposite," the court explained, "where the claim instead is that the presidential action . . . independently violates" another statute. *Id.* at 1332. The court rejected the government's position "that the Procurement Act grants the President such broad discretion . . . that the case reduces only to a claim that the President abused his discretion – a claim that [the court is] not authorized to entertain." *Id.* at 1326. It would be "untenable," the court stated, "to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to" a statutory directive. *Id.* at 1332. Rather, the court emphasized that "'[t]he responsibility of determining the

limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress. . . . '" *Id.* at 1327 (quoting *Stark v. Wickard,* 321 U.S. 288, 310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944)). The court then held that the President had exceeded his authority under the Procurement Act in issuing an Executive Order barring federal contractors from hiring replacement workers during an economic strike because the Order was pre-empted by an independent statute, the National Labor Relations Act. *Id.* at 1339.

Although the limits on Presidential authority at issue derive from the Antiquities Act itself rather than an independent statute, *Reich* is instructive, for the same policy considerations apply. Courts remain obligated to determine whether statutory restrictions have been violated. In reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority. *United States v. California,* 436 U.S. at 35-36, 98 S.Ct. at 1663-64; *Cappaert,* 426 U.S. at 141-42, 96 S.Ct. at 2071; *Cameron,* 252 U.S. at 455-56, 40 S.Ct. at 410-11.

The instant case, however, presents no occasion for the court to engage in *ultra vires* review of the Proclamations because Mountain States fails to allege any facts sufficient to support its *ultra vires* claim. Mountain States alleges in its complaint merely that the six Proclamations at issue exceed the President's authority under the Property Clause and are therefore "unconstitutional and *ultra vires*." Compl. ¶¶ 84-104. No constitutional Property Clause claim is before us, as the President exercised his delegated powers under the Antiquities Act, and that

statute includes intelligible principles to guide the President's actions. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474, 121 S.Ct. 903, 913, 149 L.Ed.2d 1 (2000); *Dalton,* 511 U.S. at 473-74 & n. 6, 114 S.Ct. at 1726-27 & n. 6. In responding to the government's reliance on the Antiquities Act, Mountain States argued in the district court that the President had included ineligible items within the designation – namely land – whereas the legislative history of the Act indicated, Mountain States asserted, that Congress intended only that rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts, were to be designated. That argument fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments. *See, e.g., Cameron,* 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659. And to the extent that Mountain States seeks *ultra vires* review under the Act, its complaint and statutory arguments present no more than legal conclusions. At no point has Mountain States presented factual allegations that would occasion further review of the President's actions. Rather, Mountain States' arguments contain only the bald assertion that the President acted outside the bounds of his constitutional and statutory authority. Although in reviewing the dismissal of a complaint the court, as it must, takes "all the factual allegations in the complaint as true," the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 2944, 92 L.Ed.2d 209 (1986) (citation omitted). Moreover, the court is necessarily sensitive to pleading requirements where, as here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers

concerns are presented. *Dalton,* 511 U.S. at 474-76, 114 S.Ct. at 1727-28; *Bush,* 310 U.S. at 380, 60 S.Ct. at 946-47.

Nothing in the record before us indicates any infirmity in the challenged Proclamations. Each Proclamation identifies particular objects or sites of historic or scientific interest and recites grounds for the designation that comport with the Act's policies and requirements. For example, Proclamation 7320, 65 Fed. Reg. at 37,259, states that the Ironwood Forest National Monument "holds abundant rock art sites and other archeological objects of scientific interest." And Proclamation 7317, 65 Fed. Reg. at 37,244, states that the 164,000 acres that comprise the Canyons of the Ancients National Monument "is the smallest area compatible with the proper care and management of the objects to be protected."

To warrant further review of the President's actions, Mountain States would have to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act. *See* Fed.R.Civ.P. 8(a); *Papasan,* 478 U.S. at 286, 106 S.Ct. at 2944-45; *Browning v. Clinton,* 292 F.3d 235 (D.C.Cir.2002). Having failed to do this, Mountain States presents the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority. The inadequacy of Mountain States' assertions thus precludes it from showing that the district court erred in declining to engage in a factual inquiry to ensure that the President has complied with the statutory standards. Even assuming the correctness of Mountain States' contention that *AFL-CIO v. Kahn,* 618 F.2d 784 (D.C.Cir.1979), and *Franke,* 58 F.Supp. 890, require a detailed factual review in some circumstances, those cases are not relevant in view of the inadequacy of Mountain States' allegations.

B.

Mountain States further contends, much as did appellants in *Reich,* that the Proclamations facially defy congressional intent regarding the scope and purpose of "a host" of other statutes enacted to protect various archeological and environmental values. Appellants' Br. at 5. This contention, however, misconceives federal laws as not providing overlapping sources of protection. Essentially, this contention parallels Mountain States' view of the limited scope of power delegated to the President under the Antiquities Act, specifically as not embracing environmental values.

According to Mountain States, the Endangered Species Act, 16 U.S.C. §§ 1532-44 (2000), is the "sole means" for protecting species and their habitat, and § 1133 of the Wilderness Act, 16 U.S.C. §§ 1131-36 (2000), is the "sole means" by which the federal government may withdraw land from public use to protect scenic beauty, natural wonders, or wilderness values. Appellant's Br. at 36, 37. Yet the Park Service Organic Act, 16 U.S.C. §§ 1-4 (2000), provides just one example of a statute that serves both purposes. *United States v. Brown,* 552 F.2d 817, 822 (8th Cir.1977). So, too, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12 (2000), the National Wildlife Refuge System Act, 16 U.S.C. § 668dd (2000), the National Forest Management Act of 1976, Pub.L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), and the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2000), all guard endangered species and their habitat. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, the National Forest Management Act, and the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-29, 531 (2000), also protect scenic and

wilderness values. Consequently, Mountain States' contention that the Antiquities Act must be narrowly construed in accord with Mountain States' view of Congress's original intent because Congress asserted its Property Clause authority in enacting the FLPMA again misses the mark.

Accordingly, we affirm the dismissal of the complaint.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5421 **September Term, 2002**

Mountain States Legal Foundation and The Blue Ribbon Coalition, Inc.,
Appellants

v.

George W. Bush, In His Official Capacity as President of the United States, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 00cv02072)

Before: EDWARDS and ROGERS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby

affirmed for the reasons set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Date: October 18, 2002

Opinion for the court filed by Circuit Judge Rogers.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*, Plaintiffs, v. GEORGE W. BUSH, Defendant, and THE WILDERNESS SOCIETY, *et al.*, Intervenors	Civil Action No. 00-2072 (PLF)

ORDER

(Filed Nov. 16, 2001)

The Court held a hearing on November 15, 2001, to hear arguments on defendant's motion to dismiss and intervenors' motion to dismiss. Upon consideration of the parties' briefs and oral arguments, and for the reasons stated in open court, it is hereby

ORDERED that defendant's motion to dismiss [33] is GRANTED; it is

FURTHER ORDERED that intervenors' motion to dismiss [31] is GRANTED; it is

FURTHER ORDERED that this case is DISMISSED for failure to state a claim; and it is

FURTHER ORDERED that this Order shall constitute a final judgment entered on all claims in this case. The Clerk of the Court shall remove this case from the court's docket.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 11/16/01

Partial Transcript of Hearing held November 15, 2001, U.S. District Court for the District of Columbia, Civil Action 00-2072, Judge Paul L. Friedman.

* * *

[46] (Recess)

THE COURT: All right. I have read all the briefs before we got here today and I read some of the cases, as I said, and I listened to your arguments very carefully and I am ready to decide this case on this motion. And what I find [47] sometimes is that if I take something under advisement and write an opinion it will be better and more articulate and better organized than orally but it will take longer for you to get a decision and sometimes much longer because of other things that I have on my calendar. And it will therefore take longer for the losing side to decide whether the matter is important enough to pursue it in the Court of Appeals. So, with apologies for lack of organization, I will try to explain my reasons and if you want a decision, order a transcript because that will be all that you'll get.

This matter is before the Court on a motion to dismiss the plaintiff's complaint, amended complaint challenging the President's Proclamations creating National Monuments in six areas of land under the Antiquities Act of 1906. The Proclamations were made by President Clinton for 2000 and 2001, reserving certain lands in Western states as National Monuments protecting land as, quote, historic interest and scientific interest.

The amended complaint raises constitutional claims – I just misplaced something. One second.

I've got it. Sorry. The amended complaint raises constitutional claims, and each of the six claims for relief relates to one of the six areas of land designated by each of the President's Proclamations, and each one of the claims for relief asserts a violation of the Property Clause of the [48] Constitution providing that the Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

As I said, the defendants and the intervenors, the Wilderness Society and Natural Resources Defense Council and others have filed motions to dismiss on the ground that the Court lacks jurisdiction to review the constitutionality of the President's decisions under Rule 12(b)(1) of the Federal Rules of Civil Procedure, and also on the ground that the plaintiff has failed to state a claim on which relief can be granted.

The standards are clear, as the plaintiff's co-counsel points out, that a complaint can only be dismissed at this stage for lack of jurisdiction or for the subject matter. It's clear that the Court doesn't have jurisdiction and it can only be dismissed for failure to state a claim only if it's clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint.

The defendant's argument – the plaintiff's arguments are that the acts of the President are unconstitutional and are ultra vires in issuing these Proclamations.

The defendants argued in the papers that plaintiff lacks standing and that the controversy isn't yet ripe, but by the time we get to oral argument the focus of both plaintiff [49] and intervenor is the – are the questions of

whether or not the Court has jurisdiction to review this kind of Presidential decision, and while there are differences of opinion between the defendant and the intervenors as to the scope of judicial review they suggest that those differences may not be essential to reach in this case.

They then argue that there is nothing unconstitutional about what the President did because under the Property Clause the Congress had the right to delegate authority to the President and that the delegation was a proper one and not an unconstitutional one, and that if we need to get to the question at all, the acts of the President were not ultra vires.

The more I listened and the more I read it seemed to me that I have to agree that this is not really a Property Clause argument per se because the President didn't act under the Property Clause. At one point the plaintiff seemed to say that I shouldn't let the defendants recast the case as an Antiquities Act case when it was brought under the Property Clause and at another point I thought I heard her say it really didn't matter whether I approached it as a Property Clause case or as an Antiquities Act case because there are still constitutional problems.

In the brief she – the plaintiffs argue, among other things, that the Antiquities Act is unconstitutional if it is [50] construed as a delegation of unlimited power such that all actions by a President are committed to his unreviewable discretion. And that the Act is unconstitutional under the nondelegation clause.

But what is clear is that the Antiquities Act is not an unlimited or uncabinned [sic] delegation to the President. It is a delegation that purports to set standards in what

the cases have called intelligible principles. If there are intelligible principles, there's not a violation of the Constitution.

There was a lot in the briefs, although not a lot today during argument, about the nondelegation doctrine. But I think it's clear, and before we get to the long history of the Antiquities Act of 1906, that the Supreme Court has really held delegations of legislative power to the Executive Branch unconstitutional in only two cases in all of the history of the nondelegation power and those are the two 1935 cases, Panama Refining Company and Schechter Poultry. Those cases are still on the books, but as Professor Davis has said, those cases are best understood in their unique historical context which included deep skepticism, et cetera, under the Great Depression, and in the case of Schechter Poultry at least, Professor Davis called it the most sweeping Congressional delegation of all time.

In this Circuit Judge Leventhal characterized these cases as arising from an extremist pattern of delegation run [51] riot in the New Deal Era in Amalgamated Meat Cutters V Connally, 337 Fed. Supp. 737. Professor Davis pointed out that the Panama decision cannot be reconciled with earlier or later decisions of the Supreme Court and neither Panama nor Schechter reflect the law today. And if we needed any reminder of that, the Supreme Court last year almost exactly a year ago, it was argued on November 7, 2000 and decided this year, February 7, 2001, Whitman versus American Trucking Association, 531 U.S. 457, that delegations by Congress, if properly done, are perfectly constitutional. And what the Supreme Court has said is that in order to make such a delegation constitutional it must provide the delegatee, in this case the President, in some cases people and agencies who enjoy a much less

unique and singular position in our Government than does the President, but in order to be constitutional such delegations must provide intelligible principles or standards that must be applied in order to make the delegation constitutional.

Without intelligible standards or principles, just saying the President or any agency or Cabinet officer or agency head can do whatever they want to do, then there may be serious constitutional problems if Congress delegates power otherwise given to it to an agency or person or officer of the Executive Branch. And so then the question is whether there are intelligible principles or standards in the Antiquities Act, 16 United States Code Section 451. I think I heard the plaintiff [52] say that at this point if I reach that question that really we're not disputing whether the principles were intelligible, whether there were standards but rather how they were applied.

Suffice it to say that the standards that have been upheld by the Supreme Court and by other Courts have been pretty general over the years. Compelling public interest, public interest, public convenience, interest or necessity, just and reasonable. And in Yakus versus United States, 321 U.S. 414 on page 427, so long as maximum beef prices were, quote, generally fair and equitable, that was an intelligible principle or standard, and the cases go on. And so what are the intelligible principles here? The President of the United States, according to this statute, is authorized, quote, in his discretion to declare by public Proclamation historic landmarks, historic and prehistoric structures and other objects of historic and scientific interest that are situated upon lands owned and controlled by the Government of the United States to be National Monuments and he may reserve as a part thereof parcels

of land, limits of which in all cases, quote, shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. Unquote.

So as the Government argued today, yes, there is discretion delegating the President but he's limited. He's limited to authorizing as National Monuments historic land [53] marks, historic and prehistoric structures and other objects of historic or scientific interest and he's limited to – by the language that he must confine the designation to the smallest area compatible to the proper care and management of the objects to be protected.

Judge Urbina in his decision, the name of which – in September, among others, Tulare County versus George W. Bush, Civil Action Number 00-2560, found these standards to be intelligible and sufficient. And sufficiently limiting.

The plaintiff argues that it's not enough just to have standards but there must be a way for the Government – I'm sorry, for the Courts to make sure that the President in the exercise of his discretion can review those standards. And as I listened to the argument and as I read the briefs I thought that there was a certain overlap between the judicial review issue and the constitutionality issue. And there was also a certain circularity, I thought, to the plaintiff's argument on these issues. But making her best argument, her argument I think is that even if the statute hasn't intelligible principles or standards and even if the President uses the magic words, how do we really know that the facts support his decisions? And can you measure, can you prove, can you show that the President met the standards?

I think the plaintiff's are arguing if not, then the statute is not constitutional and beyond that, that the

Court [54] necessarily has to have jurisdiction to look at those questions.

There is generally speaking a strong presumption in favor of judicial review of agency decisions and that presumption can only be overridden by specific language or clear and convincing evidence of legislative intent to take that review away. It's not so clear that there is as strong a presumption in favor of Presidential decisions, but as I think the intervenor and the defendants agree, at least for purposes of this case, the exact scope of judicial review doesn't really have to be plumbed because accepting the notion that the President does not have completely unreviewable discretion the Government argues that by taking the standards of the statute and putting them side by side with the Proclamations in this case, it is very clear that the President applied the standards of the statute so that what Congress delegated to him, he did.

And while I do agree with the Government that the Franke case is really out there by itself when it comes to whether or not the Court can ever engage in substantial fact finding, at the very least the Franke case, the Proclamation in the Franke case was dramatically different, narrower than any of the Proclamations in this case. The Proclamations in this case which are appended to the plaintiff's complaint and to various other documents in the case, go on at great length to explain why President Clinton did what he did and not just to [55] use the magic words but to explain that he scrupulously applied the limitations of the Antiquities Act.

Presidential Proclamation 7265, for example, on January 11, 2000 establishing the Grand Canyon, I'm not sure how to pronounce it, Parashant National Monument

explicitly stated that the area is a vast, biologically diverse, impressive landscape encompassing an array of scientific and historic objects. It describes the 11,000 years of human history and two billion years of geologic history. And it stated and explained that the land preserved was the smallest area compatible with the proper care and management of the objects to be protected. The other Proclamations have similar explanations. The ecological wonder of Cascade-Siskiyou National Monument, describing the land as home to rare and beautiful species of animals and plants as well as geological wonders.

Proclamation 7319 establishing the Hanford Reach National Monument and describing the land as a haven for important and increasingly scarce objects of the scientific and historic interest, specifically objects involved in the development of nuclear weapons and environmental clean-up activities. It noted that the Monument contains important riparian, aquatic, and upland shrub-steppe habitats that are rare or in decline in other areas as well as the last free-flowing non-tidal stretch of the Columbia River. It said [56] that it contains geological and paleontological objects, as well as archeological and historic information, arising from more than 10,000 years of human activity and again stated that the 195,000 acres there were to be preserved as the smallest area compatible with proper care and management of the objects to be protected.

These Proclamations, each of them, go on for several pages in explaining the bases in which the President has issued those Proclamations. When one puts the Proclamations alongside the statute, then one sees that the President has measured his actions against the intelligible

principles or standards of the Antiquities Act. And it follows, it seems to me, that his actions are constitutional.

Judge Urbina in his opinion explained that under the relevant Supreme Court precedents, that it's really unnecessary and impermissible to go beyond that kind of analysis, and any greater degree of judicial review would be – is not permissible. The cases on which he relies and the cases on which the Government relies here today I think largely support that kind of limited judicial or intermediate judicial review, and so at least in this case it seems to me that factual – facial adherence, excuse me, to the statute is all that is required, and as Judge Urbina found in Tulare County.

The cases on which he relied, United States versus George S. Bush & Company, the cases on which the Government [57] relies here today, including Cameron, Cappaert, I frankly read those cases as not making the kinds of factual findings or requiring the kinds of factual findings that the plaintiff says are required or suggested by those cases but rather as I think I suggested in prior questioning, as Mr. Gheleta said in his rebuttal argument, it really was not the Supreme Court making findings in Cameron so much as it was the Supreme Court essentially reading directly or paraphrasing the Proclamation and then making statements of general knowledge about that part of the country. Cappaert is to the same effect. The reason there is limited judicial review in a case like this of Presidential decisionmaking is that it would be inconsistent with those cases and on its face would be so difficult to engage in that kind of fact-finding without secondguessing the President and the discretion that Congress has given him.

It seems to me that, as I say, I think that the jurisdictional questions to a certain extent meld into the constitutional questions, that once Congress has exercised legitimate delegation of authority to the President and articulated intelligible standards, intelligible principles or standards, and it's clear by placing the – by facially examining in this case the Proclamations of Presidential decisions generally, laying them side by side with the standards of the statute itself, and concluding that the President at least facially, has met those standards and has [58] been – and has adhered to those standards, that it's not the role of the Court to go beyond that and to engage in fact-finding as to exactly how many acres would have been the smallest area compatible with the proper care and management of the objects to be protected, for example, or whether or not these were historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest.

And as a parenthetical, I think the cases that were cited in the briefs and in oral argument today by the Government and the intervenors make it clear that historical objects can include things other than – I guess the phrase is other objects of historic or scientific interest can include things other than physical landmarks and structures. And again the case that was mentioned specifically that makes that clear, although there are lots of them, is the Cappaert case, C-A-P-P-A-E-R-T, Cappaert versus United States, 426 U.S. 128, pages 141 and 142. It's not the Government's role – I'm sorry, it's not the Court's role to plumb the record to see whether there's substantial evidence in the record, to the extent there is a record, or to have a trial or to require the President or those working for him to sit through depositions to determine exactly

what facts and factors went into the decisionmaking besides beyond what's in the Proclamations.

So the President's power is not unlimited. It's [59] guided by his exercise of discretion and it's guided by the limits set forth in the statutes. By comparing the language of the statute of the Antiquities Act with the language of the Proclamation which is – and the Proclamations in this case are quite detailed, I find that the President met his responsibilities to the Congress under the Act and that it's not my role to look at the specific decisions so long as he applied those – facially applied those standards.

Based on Judge Urbina's analysis in Tulare, based on other cases cited by the Government and by the intervenors I think that's as far as is appropriate in terms of the role of the Court, and the statute appears to me to be perfectly constitutional both as applied – both as – both on its face and as applied in this case.

So while the President's discretion may not be wholly unreviewable, he has a great deal of discretion under this statute, and the role of the Court in determining whether he's met his statutory responsibilities is quite limited. Any review beyond the words of the Proclamation would be extremely difficult and beyond the scope of appropriate judicial review in a case like this involving the President, involving the statute because there's no reasonable method for the Court to review the factual findings other than through a trial after discovery, and other than the Franke case I don't think there's any authority that suggests that that's appropriate for the [60] Courts to do in this case.

I guess – on the question of whether the Antiquities Act limits the President's creation of National Monuments

to manmade objects, I think that the cases cited in the defendant's reply beginning at page ten, I mentioned Cappaert versus United States, there's also Anaconda Copper and others, Cameron, make it clear that it's not so limited.

To the extent that I need to reach the ultra vires argument, although I don't think I do, once I found that the President has authority under the Antiquities Act to create National Monuments and once I found that he's applied the standard of intelligible principles I don't see how I can – I don't see that there's anything left of the ultra vires argument.

I guess that to a certain extent the ultra vires question boiled down to whether or not in the end I may have boiled down to whether or not natural objects, forests, rivers and the like are included, and I think I've dealt with that. I mentioned the cases. Judge Urbina dealt with that as well. And as Mr. Angell pointed out, the language of the Act as well as the Supreme Court and other precedent make it clear that those things are intended to be included.

As I say, there are some examples in the intervenors' reply brief, hypothetical examples of things that would be beyond the President's discretion, and there is some difference [61] between the Government's view of what can and cannot be reviewed by a Court, but those sort of extreme examples or more specifics [sic] examples really don't present themselves.

And now I have found Judge Urbina's opinion. I was searching for it in the middle of all of this.

So I really do think on the facts of this case the kind of judicial review that Judge Urbina found appropriate in Tulare County and certain other Courts have applied, makes a great deal of sense. He said the Antiquities Act establishes clear standards and limitations that details the types of objects that can be included in Monuments and a method for determining the size of Monuments. "Even if standards and limitations are somewhat broad, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." And as I indicated, going over some of the history in the nondelegation doctrine, this statute actually provides a great deal more guidance than lots of the other statutes that the Supreme Court and other Courts have held as constitutional in litigation over the years.

I think it is also fair to say finally that some of the arguments presented have been on shifting sand and – but it has to be remembered that the plaintiff – I'm sorry, that the defendant has asked that the complaint be dismissed, and in looking at whether a complaint should be dismissed on failure [62] to state a claim and one has to look at the face of the complaint, and despite some of the arguments that Miss Koehler made this afternoon, I think it is accurate having looked at the amended complaint as Mr. Angell argued, to say that the plaintiff really hasn't made factual claims that should require a trial and discovery. She did make constitutional claims. So that's another point.

Is there anything else that anybody thinks I missed? I probably didn't miss anything. I probably said everything about three times. But if there's anything else that you

think needs to be covered for purposes of the record or for appeal, or anything you're not clear about, tell me.

MR. ANGELL: We don't have anything, Your Honor.

MR. GHELETA: No, Your Honor.

MS. KOEHLER: No, Your Honor.

THE COURT: I will issue a short Order probably tomorrow which just says for the reasons stated in open Court that the motions to dismiss are granted and that will be the final Order and that in conjunction with the transcript will give you the basis to go to the Court of Appeals if that's what you want to do.

Okay. Thank you all for all your work and the argument, and again I just thought it would be better to get it decided and you can take it from here. Thank you.

(Proceedings concluded at 4:40 p.m.)

[63] CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcription from the record of proceedings in the above-entitled matter.

/s/ Santa Zizzo
Official Court Reporter

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5421 **September Term, 2002**
00cv02072

Mountain States Legal Foundation, on Behalf of its Members and The Blue Ribbon Coalition, Inc., On Behalf of Its Members,
Appellants

Filed On:

v.

George W. Bush, In His Official Capacity as President of the United States, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson,* Randolph, Rogers, Tatel, and Garland, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

(Filed Jan. 30, 2003)

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

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* Circuit Judge Henderson did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Property Clause, U.S. Const., art. IV, sec. 3, cl. 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of [sic] particular State.

Antiquities Act, 16 U.S.C. § 431.

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confirmed to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOUNTAIN STATES LEGAL FOUNDATION, 707 Seventeenth Street, Suite 3030, Denver, Colorado 80202, On Behalf of Its Members, and THE BLUE RIBBON COALITION, 1540 North Arthur Avenue, Pocatello, Idaho 83204, On Behalf of Its Members, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, In His Official Capacity as President of the United States, Defendant.	Civil No.: 1:00CV02072 PLF **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, by and through counsel, allege the following:

INTRODUCTION

1. This Complaint concerns Proclamation 7265 of January 11, 2000; Proclamations 7317, 7318, 7319, and 7320 of June 9, 2000; and Proclamation 7397 of January 17, 2001, by the President of the United States, each of which proclaims the establishment of a National Monument (affixed hereto as Attachments 1-6). Proclamation 7265 purports to create the "Grand Canyon-Parashant National Monument" in northwestern Arizona. Attachment 1. Proclamation 7317 purports to create the "Canyons of the Ancients National Monument" in southwestern Colorado. Attachment 2. Proclamation 7318 purports to create the "Cascade-Siskiyou National Monument" in southwestern Oregon. Attachment 3. Proclamation 7319 purports to create the "Hanford Reach National Monument" in south central Washington. Attachment 4. Proclamation 7320 purports to create the "Ironwood Forest National Monument" in south central Arizona. Attachment 5. Proclamation 7397 purports to create the "Sonoran Desert National Monument" in southern Arizona. Attachment 6.

2. Plaintiffs, Mountain States Legal Foundation (MSLF), on behalf of its members, and the Blue Ribbon Coalition (BRC), on behalf of its members, ask this Court to declare unconstitutional the aforementioned Proclamations made by Defendant on January 11, 2000; June 9, 2000; and January 17, 2001, purporting to create national monuments in Arizona, Colorado, Oregon, and Washington. Plaintiffs ask that the Court set aside these Proclamations

as unconstitutional, enjoin management of the affected areas as national monuments, enjoin any enforcement of new rules and regulations contained in or based upon these Proclamations respecting property within these reservations, and order that the affected areas be returned to their prior management status. Plaintiffs request this declaratory and injunctive relief on the grounds that Defendant acted *ultra vires* any constitutional authority he may have [sic] when he proclaimed the existence of these six national monuments.

JURISDICTION AND VENUE

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (federal question) because the matter in controversy arises under the Constitution of the United States.

4. Venue rests properly in this Court pursuant to 28 U.S.C. § 1391 (b) (1), because Defendant resides in Washington, D.C.

PARTIES

5. Plaintiff Mountain States Legal Foundation (MSLF) is a voluntary, not-for-profit, public-interest corporation organized under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. MSLF is dedicated to individual liberty, the right to own and use property, limited government, and the free enterprise system. MSLF is dedicated to the principals of limited government and the doctrine of the separation of powers inherent in the Constitution. MSLF is dedicated to ensuring that federal lands remain open for

multiple use as provided by federal law. MSLF has members throughout the United States, particularly in the West, including the states of Arizona, Colorado, Oregon, and Washington. Members of MSLF have in the past used, and have concrete plans for the future to use, each of the six areas at issue in this Complaint for a variety of purposes including, but not limited to: prospecting for minerals, exploring for and mining for ore bodies, exploring for and drilling for oil and gas deposits, hunting, fishing, camping or otherwise recreating, grazing livestock, harvesting timber, obtaining access to repair, upgrade or replace power transmission lines and facilities, obtaining access to private property or state-owned property, maintaining equipment and water lines, and for other lawful uses. As a result of the designation of the challenged monuments, members of MSLF who formerly pursued these lawful uses of the public lands at issue are no longer permitted to pursue such activities on those lands.

6. JABA (U.S.), Inc. is a member of Mountain States Legal Foundation. JABA (U.S.), Inc. is engaged exclusively in exploration and development of mineral resources throughout the United States and its Territories.

7. JABA has invested substantial resources in exploration and development of the Silver Bell region of Arizona, leading to significant and potentially very profitable discoveries. The Silver Bell region is now included within the boundaries of the Ironwood Forest National Monument.

8. JABA had concrete plans to continue exploration and development of the Silver Bell region. But for the designation of the Ironwood Forest National Monument, JABA would continue exploration and development of the

Silver Bell region. As a result of the designation of the Ironwood Forest National Monument, JABA will no longer be able to explore or enter and locate mining claims in the Silver Bell region.

9. Robert Ferreira is a member of Mountain States Legal Foundation. For more than forty years, Mr. Ferreira frequently and consistently used both federal and private lands in the Soda Mountain region of southwestern Oregon for recreational purposes, including hunting, camping, and fishing. Mr. Ferreira had concrete plans to continue to recreate on these lands, along with his family, during the winter and spring of 2001 and thereafter.

10. The Soda Mountain region is now encompassed within the boundaries of the Cascade-Siskiyou National Monument.

11. As a result of the designation of the Cascade-Siskiyou National Monument, roads have been closed and fishing and camping access blocked, denying Mr. Ferreira and his family access to areas of federal and private land where they have recreated for decades. As a result of being denied access, Mr. Ferreira and his family are no longer able to hunt or otherwise recreate in these areas.

12. Sherman Peters is a member of the Jackson County, Oregon, Chapter of Frontiers of Freedom – People for the U.S.A., which is an organizational member of Mountain States Legal Foundation.

13. Mr. Peters resides within the boundaries of the Cascade-Siskiyou National Monument on five acres of private property. Mr. Peters frequently and consistently used roads in the area for all-terrain vehicle (ATV) access and for other recreational access purposes and had concrete

plans to continue to do so through the winter and spring of 2001 and thereafter.

14. The roads and recreation areas used by Mr. Peters are now encompassed within the boundaries of the Cascade-Siskiyou National Monument.

15. As a result of designation of the Cascade-Siskiyou National Monument, roads have been closed, denying Mr. Peters access to the areas where he has enjoyed ATV riding and other forms of recreation for years. Federal officials have threatened to issue citations to persons using motorized vehicles on the closed roads.

16. As a result of the denial of access, Mr. Peters is unable to recreate in the area where he lives and previously recreated.

17. Kurt Stark is President of the Jackson County, Oregon, Chapter of Frontiers of Freedom – People for the U.S.A., which is an organizational member of Mountain States Legal Foundation.

18. Mr. Stark owns private property in the Soda Mountain region of southwestern Oregon, which is now encompassed within the boundaries of the Cascade-Siskiyou National Monument.

19. The Bureau of Land Management (BLM) caused damage to Mr. Stark's private property while implementing BLM policy ensuing from designation of the Cascade-Siskiyou National Monument.

20. Mr. Stark's private property is placed at increased and imminent risk of damage and destruction from uncontained fire as a result of BLM policy ensuing from designation of the Cascade-Siskiyou National Monument

that prevents Mr. Stark from entering federal lands within the Monument and taking action as necessary to fight wildfires.

21. Steve and LaRene Layton are members of Mountain States Legal Foundation. The Laytons operate the Layton Ranch on federal lands pursuant to a BLM grazing permit in an area referred to as the Arizona Strip.

22. The Layton Ranch is now included within the boundaries of the Grand Canyon-Parashant National Monument.

23. The Laytons have experienced difficulty in conducting ranch operations as a result of BLM policies ensuing from designation of the Grand Canyon-Parashant National Monument, including a policy of minimal road maintenance and a prohibition on wood-gathering within the Monument boundaries.

24. Ken and Charlene Sinclair are members of Mountain States Legal Foundation. The Sinclairs own private property in southwestern Colorado that is now encompassed within the boundaries of the Canyons of the Ancients National Monument.

25. The designation of the Canyons of the Ancients National Monument has placed a cloud on the title of the Sinclairs' private property within the Monument, reducing the value of the property, and resulted in the imposition of procedural requirements for access to their private property.

26. Plaintiff the Blue Ribbon Coalition (BRC) is a not-for-profit corporation organized under the laws of the State of Idaho. The membership of BRC includes over 550 businesses and organizations with a total of approximately

600,000 members nationwide. BRC has a long-standing interest in the protection of the values and natural resources addressed in the Proclamations at issue in this Complaint and regularly works with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors. BRC members use motorized and non-motorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access federal lands throughout the United States, including such lands in Arizona, Colorado, Oregon, and Washington. BRC members have visited each of the six areas at issue in this Complaint and have concrete plans to continue to visit each of these areas. As a result of the challenged monument designations, members of BRC who formerly pursued various recreational uses of the public lands at issue are no longer permitted to pursue such activities on those lands.

27. Randall Brich is a member of Mountain States Legal Foundation and Blue Ribbon Coalition. Mr. Brich is an avid mountain biker and has frequently and consistently enjoyed riding the White Bluffs Single Track bike trail in south-central Washington for the past decade. Mr. Brich had concrete plans to continue riding the White Bluffs Single Track trail throughout the winter and spring of 2001 and thereafter.

28. The White Bluffs Single Track trail is now encompassed within the boundaries of the Hanford Reach National Monument.

29. As a result of the designation of the Hanford Reach National Monument, all off-road mechanized vehicle access is abolished within Monument boundaries, including the White Bluffs Single Track trail.

30. As a direct result of the creation of the Hanford Reach National Monument, Mr. Brich is foreclosed from riding the White Bluffs Single Track bike trail and otherwise recreating in this area where he has enjoyed recreation for years.

31. Gary "Rocky" Reeser is a member of Blue Ribbon Coalition. Mr. Reeser is an avid motorcycle rider and has frequently and consistently enjoyed motorcycle riding and other forms of motorized recreation in the Soda Mountain region of southwestern Oregon, particularly along a route known as the Schoheim Road. Mr. Reeser had concrete plans to continue motorized recreation in the area and along the Schoheim Road through the winter and spring of 2001 and thereafter.

32. Many areas that Mr. Reeser visited by motorized access are now encompassed within the Cascade-Siskiyou National Monument, including the Schoheim Road.

33. As a result of the designation of the Cascade-Siskiyou National Monument, the Schoheim road was closed to motorized travel.

34. Without motorized access, because of the rugged landscape and his physical inability to walk great distances, Mr. Reeser and his family have been foreclosed from enjoying and recreating in an area where they have enjoyed recreation for years.

35. Defendant William Jefferson Clinton is President of the United States. In such capacity, President Clinton is responsible for discharging his duties as Chief Executive pursuant solely to the authority granted to the President by the Constitution of the United States. President Clinton may

not exercise authority not granted to him by the Constitution of the United States.

STATEMENT OF FACTS

36. On January 11, 2000, President William Jefferson Clinton signed and issued Presidential Proclamation 7265, proclaiming the establishment of a new national monument in the State of Arizona.

37. On January 18, 2000, Proclamation 7265 of January 11, 2000, was published in the *Federal Register*.

38. On June 9, 2000, President William Jefferson Clinton signed and issued four consecutive Proclamations, numbered 7317 though 7320, proclaiming the establishment of four new national monuments in the states of Colorado, Oregon, Washington, and Arizona.

39. On June 13, 2000, Proclamations 7317 through 7320 of June 9, 2000, were published in the *Federal Register*.

40. On January 17, 2001, President William Jefferson Clinton signed and issued Proclamation 7397 proclaiming the establishment of a new national monument in the State of Arizona.

41. On January 22, 2001, Proclamation 7397 of January 17, 2001, was published in the *Federal Register*.

42. Each of these Proclamations purports to set apart and to reserve all lands and interests in lands owned or controlled by the United States within the boundaries of the areas described by a map attached to and forming part of each Proclamation. Each of these Proclamations, whether or not a valid exercise of constitutional authority

by the President, has the immediate *de facto* affect of withdrawing and reserving the lands described therein.

43. Proclamation 7265 of January 11, 2000, is entitled, "Establishment of the Grand Canyon-Parashant National Monument." Proclamation 7265 purports to withdraw and reserve an area of 1,014,000 acres north of Grand Canyon National Park in northwest Arizona, seventy-five miles northwest of Flagstaff, Arizona.

44. Proclamation 7265 directs the Secretary of the Interior (the Secretary) to manage the Grand Canyon-Parashant National Monument through the Bureau of Land Management (BLM) and the National Park Service (NPS) as a national monument.

45. Proclamation 7265 withdraws all Federal lands within the boundaries of the monument from all entry, location, selection, sale or other disposition under the public land laws, including the mining laws and laws relating to mineral and geothermal leasing.

46. Proclamation 7265 directs the Secretary to prohibit all non-emergency off-road use of motorized and mechanized vehicles in the area covered by the Proclamation.

47. Proclamation 7265 prohibits the sale of vegetative material from the area covered by the Proclamation unless such sale is part of an authorized science-based ecological restoration project.

48. Proclamation 7265 directs the NPS and the BLM to manage the monument cooperatively and to prepare an agreement to share whatever resources are necessary to manage the monument.

49. Proclamation 7265 provides that the NPS shall have primary management authority over the portion of the area covered by the Proclamation within the Lake Mead National Recreation Area and that the BLM shall have primary management authority over the remaining portion of the area covered by the Proclamation.

50. Proclamation 7317 of June 9, 2000, is entitled, "Establishment of the Canyons of the Ancients National Monument." Proclamation 7317 purports to withdraw and reserve an area of 164,000 acres in the Four Corners region of southwestern Colorado, forty-five miles west of Durango, Colorado.

51. Proclamation 7317 directs the Secretary to manage the Canyons of the Ancients National Monument through the BLM as a national monument.

52. Proclamation 7317 withdraws all Federal lands within the boundaries of the monument from all entry, location, selection, sale or other disposition under the public land laws, including the mining laws and laws relating to mineral leasing, except that the area shall remain open to oil and gas leasing and development, as long as no "new impacts" are created through the exercise of these valid existing rights.

53. Proclamation 7317 directs the Secretary to prohibit all non-emergency off-road use of motorized and mechanized vehicles in the area covered by the Proclamation.

54. Proclamation 7317 directs the Secretary to "prepare a transportation plan that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in this Proclamation."

55. Proclamation 7318 of June 9, 2000, is entitled, "Establishment of the Cascade-Siskiyou National Monument." Proclamation 7318 purports to withdraw and reserve an area of 52,000 acres located at the convergence of the Klamath and Cascade Mountains in southwestern Oregon, twenty-five miles southeast of Medford, Oregon.

56. Proclamation 7318 directs the Secretary to manage the Cascade-Siskiyou National Monument through the BLM as a national monument.

57. Proclamation 7318 withdraws all Federal lands within the boundaries of the monument from all entry, location, selection, sale or other disposition under the public land laws, including the mining laws and laws relating to mineral and geothermal leasing.

58. Proclamation 7318 directs the Secretary to prohibit all non-emergency off-road use of motorized and mechanized vehicles in the area covered by the Proclamation.

59. Proclamation 7318 directs the Secretary to prepare, within three years, a management plan for the monument to include appropriate transportation planning, including road closures or travel restrictions necessary to protect the objects identified in the Proclamation.

60. Proclamation 7318 reserves, subject to valid existing rights, "a quantity of water sufficient to fulfill the purposes for which this monument is established."

61. Proclamation 7318 prohibits the commercial harvest of timber or other vegetative material from the area covered by the Proclamation.

62. Proclamation 7318 directs the Secretary to study the impacts of livestock grazing on the area, "with specific attention to sustaining the natural ecosystem dynamics." Proclamation 7318 further directs the Secretary to retire any and all grazing allotments, "[s]hould grazing be found incompatible with protecting the objects of biological interest" within the area covered by the Proclamation.

63. Proclamation 7319 of June 9, 2000, is entitled, "Establishment of the Hanford Reach National Monument." Proclamation 7319 purports to withdraw and reserve an area of 195,000 acres located along the Columbia River in south-central Washington, within the borders of the Department of Energy's (DOE) Hanford Nuclear Reservation.

64. Proclamation 7319 directs the U.S. Fish and Wildlife Service (FWS), under existing agreements with the DOE, to manage the Hanford Reach National Monument along with the DOE as a national monument.

65. Proclamation 7319 withdraws all Federal lands within the monument boundaries from all entry, location, selection, sale or other disposition under the public land laws, including the mining laws and laws relating to mineral and geothermal leasing.

66. Proclamation 7319 directs the DOE to turn over gradually to the USFWS the lands that the DOE manages that were formerly part of the Hanford Nuclear Reservation, as such lands become suitable for management by the USFWS.

67. Proclamation 7319 directs the Secretary to prohibit all non-emergency off-road use of motorized and

mechanized vehicles in the area covered by the Proclamation.

68. Proclamation 7319 reserves a quantity of water in the Columbia River sufficient to fulfill the purposes for which the monument is established.

69. Proclamation 7319 instructs the Secretary to prohibit all livestock grazing in the area covered by the Proclamation.

70. Proclamation 7320 of June 9, 2000, is entitled, "Establishment of the Ironwood Forest National Monument." Proclamation 7320 purports to withdraw and reserve an area of 129,000 acres about twenty-five miles northwest of Tucson in southern Arizona.

71. Proclamation 7320 instructs the Secretary to manage the Ironwood Forest National Monument through the BLM as a national monument.

72. Proclamation 7320 withdraws all Federal lands within the monument boundaries from all entry, location, selection, sale or other disposition under the public land laws, including the mining laws and laws relating to mineral and geothermal leasing.

73. Proclamation 7320 directs the Secretary to prohibit all non-emergency off-road use of motorized and mechanized vehicles in the area covered by the Proclamation.

74. Proclamation 7320 directs the Secretary to prepare a transportation plan that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in the Proclamation.

75. Proclamation 7397 of January 17, 2001, is entitled "Establishment of the Sonoran Desert National Monument." Proclamation 7397 purports to withdraw and reserve an area of 486,149 acres about sixty miles from Phoenix in southern Arizona.

76. Proclamation 7397 instructs the Secretary to manage the Sonoran Desert National Monument through the BLM as a national monument.

77. Proclamation 7397 withdraws all Federal lands within the monument boundaries from all entry, location, selection, sale, leasing or other disposition under the public land laws, including the mining laws and laws relating to mineral and geothermal leasing.

78. Proclamation 7397 directs the Secretary to prohibit all non-emergency off-road use of motorized and mechanized vehicles in the area covered by the Proclamation.

79. Proclamation 7397 directs the Secretary to prepare a management plan that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in the Proclamation.

80. Proclamation 7397 directs the Secretary that grazing permits on federal lands within the monument south of Interstate Highway 8 shall not be renewed at the end of their current term. Proclamation 7397 further directs that grazing on federal lands north of Interstate 8 shall be allowed to continue only to the extent that the BLM determines that grazing is compatible with the paramount purpose of protecting the objects identified in the Proclamation.

FIRST CLAIM FOR RELIEF

81. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1 through 80 of this Complaint.

82. The Property Clause of the United States Constitution provides, "*[t]he Congress* shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " (Emphasis added.)

83. On January 11, 2000, President William Jefferson Clinton made "Rules and Regulations respecting the Territory or other Property belonging to the United States" by issuing Proclamation 7265.

84. In issuing Proclamation 7265, President Clinton acted unconstitutionally and *ultra vires.*

SECOND CLAIM FOR RELIEF

85. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1 through 84 of this Complaint.

86. The Property Clause of the United States Constitution provides, "*[t]he Congress* shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " (Emphasis added.)

87. On June 9, 2000, President William Jefferson Clinton made "Rules and Regulations respecting the Territory or other Property belonging to the United States" by issuing Proclamation 7317.

88. In issuing Proclamation 7317, President Clinton acted unconstitutionally and *ultra vires.*

THIRD CLAIM FOR RELIEF

89. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1 through 88 of this Complaint.

90. The Property Clause of the United States Constitution provides, "*[t]he Congress* shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " (Emphasis added.)

91. On June 9, 2000, President William Jefferson Clinton made "Rules and Regulations respecting the Territory or other Property belonging to the United States" by issuing Proclamation 7318.

92. In issuing Proclamation 7318, President Clinton acted unconstitutionally and *ultra vires.*

FOURTH CLAIM FOR RELIEF

93. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1 through 92 of this Complaint.

94. The Property Clause of the United States Constitution provides, "*[t]he Congress* shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " (Emphasis added.)

95. On June 9, 2000, President William Jefferson Clinton made "Rules and Regulations respecting the Territory or other Property belonging to the United States" by issuing Proclamation 7319.

96. In issuing Proclamation 7319, President Clinton acted unconstitutionally and *ultra vires*.

FIFTH CLAIM FOR RELIEF

97. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1 through 96 of this Complaint.

98. The Property Clause of the United States Constitution provides, "*[t]he Congress* shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " (Emphasis added.)

99. On June 9, 2000, President William Jefferson Clinton made "Rules and Regulations respecting the Territory or other Property belonging to the United States" by issuing Proclamation 7320.

100. In issuing Proclamation 7320, President Clinton acted unconstitutionally and *ultra vires*.

SIXTH CLAIM FOR RELIEF

101. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1 through 100 of this Complaint.

102. The Property Clause of the United States Constitution provides, "*[t]he Congress* shall have the

Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " (Emphasis added.)

103. On January 17, 2001, President William Jefferson Clinton made "Rules and Regulations respecting the Territory or other Property belonging to the United States" by issuing Proclamation 7397.

104. In issuing Proclamation 7397, President Clinton acted unconstitutionally and *ultra vires*.

WHEREFORE, Plaintiffs request that the Court grant relief and judgment against Defendant as follows:

1. Declare that Defendant acted unconstitutionally and/or *ultra vires* in issuing Proclamation 7265; Proclamations 7317, 7318, 7319, and 7320; and Proclamation 7397.

2. Declare that Proclamation 7265; Proclamations 7317, 7318, 7319, and 7320; and Proclamation 7397, are null and void.

3. Order that the lands contained within the areas covered by Proclamation 7265; Proclamations 7317, 7318, 7319, and 7320; and Proclamation 7397, be returned to the legal management status they held prior to the issuance of these Proclamations.

4. Enjoin Defendant and all agents of Defendant from enforcing any of the rules and regulations contained in Proclamation 7265; Proclamations 7317, 7318, 7319, and 7320; and Proclamation 7397.

5. Compel Defendant and all agents of Defendant to comply with the Constitution and all applicable federal

law relating to withdrawal and reservation of lands owned by the United States.

6. Award Plaintiffs attorneys' fees and costs to the extent permitted by law; and

7. Grant Plaintiffs such further relief as may be appropriate.

Dated this 25th day of January, 2001.

Respectfully submitted,

/s/ William Perry Pendley
[/s/ by SAK]

William Perry Pendley, Esq.
S. Amanda Koehler, Esq.
Mountain States Legal Foundation
707 Seventeenth Street, Suite 3030
Denver, Colorado, 80202
(303) 292-2021

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2001, I served a true and correct copy of the foregoing FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF on the following counsel by Federal Express overnight delivery, billed to sender and addressed to:

Ann D. Navaro
Environment and Natural Resources Division
U.S. Department of Justice
601 Pennsylvania Avenue N.W., Room 854
Washington, D.C. 20004

Michael Gheleta
Environment and Natural Resources Division
Suite 945, North Tower
999 18th Street
Denver, CO 80202

James S. Angell
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 30
Denver, CO 80202

Johanna Wald
Natural Resources Defense Council
71 Stevenson Street, Suite 1825
San Francisco, CA 94105

/s/ S. Amanda Koehler

ATTACHMENT 1

Presidential Documents

Federal Register/Vol. 65, No. 11/Tuesday, January 18, 2000

Proclamation 7265 of January 11, 2000

Establishment of the Grand Canyon-Parashant National Monument

By the President of the United States of America

A Proclamation

The Grand Canyon-Parashant National Monument is a vast, biologically diverse, impressive landscape encompassing an array of scientific and historic objects. This remote area of open, undeveloped spaces and engaging scenery is located on the edge of one of the most beautiful

places on earth, the Grand Canyon. Despite the hardships created by rugged isolation and the lack of natural waters, the monument has a long and rich human history spanning more than 11,000 years, and an equally rich geologic history spanning almost 2 billion years. Full of natural splendor and a sense of solitude, this area remains remote and unspoiled, qualities that are essential to the protection of the scientific and historic resources it contains.

The monument is a geological treasure. Its Paleozoic and Mesozoic sedimentary rock layers are relatively undeformed and unobscured by vegetation, offering a clear view to understanding the geologic history of the Colorado Plateau. Deep canyons, mountains, and lonely buttes testify to the power of geological forces and provide colorful vistas. A variety of formations have been exposed by millennia of erosion by the Colorado River. The Cambrian, Devonian, and Mississippian formations (Muav Limestone, Temple Butte Formation, and the Redwall Limestone) are exposed at the southern end of the lower Grand Wash Cliffs. The Pennsylvanian and Permian formations (Calville Limestone, Esplanade Sandstone, Hermit Shale, Toroweap Formation, and the Kaibab Formation) are well exposed within the Parashant, Andrus, and Whitmore Canyons, and on the Grand Gulch Bench. The Triassic Chinle and Moenkopi Formations are exposed on the Shivwits Plateau, and the purple, pink, and white shale, mudstone, and sandstone of the Triassic Chinle Formation are exposed in Hells Hole.

The monument encompasses the lower portion of the Shivwits Plateau, which forms an important watershed for the Colorado River and the Grand Canyon. The Plateau is bounded on the west by the Grand Wash Cliffs and on the east by the Hurricane Cliffs. These cliffs, formed by large

faults that sever the Colorado Plateau slicing north to south through the region, were and are major topographic barriers to travel across the area. The Grand Wash Cliffs juxtapose the colorful, lava-capped Precambrian and Paleozoic strata of the Grand Canyon against the highly faulted terrain, recent lake beds, and desert volcanic peaks of the down-dropped Grand Wash trough. These cliffs, which consist of lower and upper cliffs separated by the Grand Gulch Bench, form a spectacular boundary between the basin and range and the Colorado Plateau geologic provinces. At the south end of the Shivwits Plateau are several important tributaries to the Colorado River, including the rugged and beautiful Parashant, Andrus, and Whitmore canyons. The Plateau here is capped by volcanic rocks with an array of cinder cones and basalt flows, ranging in age from 9 million to only about 1000 years old. Lava from the Whitmore and Toroweap areas flowed into the Grand Canyon and dammed the river many times over the past several million years. The monument is pocketed with sinkholes and breccia pipes, structures associated with volcanism and the collapse of underlying rock layers through ground water dissolution.

Fossils are abundant in the monument. Among these are large numbers of invertebrate fossils, including bryozoans and brachiopods located in the Calville limestone of the Grand Wash Cliffs, and brachiopods, pelecypods, fenestrate bryozoa, and crinoid ossicles in the Toroweap and Kaibab formations of Whitmore Canyon. There are also sponges in nodules and pectenoid pelecypods throughout the Kaibab formation of Parashant Canyon.

The Grand Canyon-Parashant National Monument contains portions of geologic faults, including the Dellenbaugh fault, which cuts basalt flows dated 6 to 7 million years

old, the Toroweap fault, which has been active within the last 30,000 years, the Hurricane fault, which forms the Hurricane Cliffs and extends over 150 miles across northern Arizona and into Utah, and the Grand Wash fault, which bounds the west side of the Shivwits Plateau and has approximately 15,000 feet of displacement across the monument.

Archaeological evidence shows much human use of the area over the past centuries. Because of their remoteness and the lack of easy road access, the sites in this area have experienced relatively little vandalism. Their good condition distinguishes them from many prehistoric resources in other areas. Prehistoric use is documented by irreplaceable rock art images, quarries, villages, watchtowers, agricultural features, burial sites, caves, rockshelters, trails, and camps. Current evidence indicates that the monument was utilized by small numbers of hunter-gatherers during the Archaic Period (7000 B.C. to 300 B.C.). Population and utilization of the monument increased during the Ancestral Puebloan Period from the Basketmaker II Phase through the Pueblo II Phase (300 B.C. to 1150 A.D.), as evidenced by the presence of pit houses, habitation rooms, agricultural features, and pueblo structures. Population size decreased during the Pueblo III Phase (1150 A.D. to 1225 A.D.). Southern Paiute groups replaced the Pueblo groups and were occupying the monument at the time of Euro-American contact. Archeological sites in the monument include large concentrations of ancestral Puebloan (Anasazi or Hitsatsinom) villages, a large, intact Pueblo II village, numerous archaic period archeological sites, ancestral Puebloan sites, and Southern Paiute sites. The monument also contains areas of importance to existing Indian tribes.

In 1776, the Escalante-Dominguez expedition of Spanish explorers passed near Mount Trumbull. In the first half of the 19th century, Jedediah Smith, Antonio Armijo, and John C. Fremont explored portions of this remote area. Jacob Hamblin, a noted Mormon pioneer, explored portions of the Shivwits Plateau in 1858 and, with John Wesley Powell, in the 1870s. Clarence Dutton completed some of the first geological explorations of this area and provided some of the most stirring written descriptions. Having traversed this area by wagon at the request of the territorial legislature, Sharlot Hall recommended it for inclusion within the State of Arizona when it gained Statehood in 1912. Early historic sawmills provided timber that was hauled 70 miles along the Temple Trail wagon road from Mt. Trumbull down the Hurricane Cliffs to St. George, Utah. Ranch structures and corrals, fences, water tanks, and the ruins of sawmills are scattered across the monument and tell the stories of the remote family ranches and the lifestyles of early homesteaders. There are several old mining sites dating from the 1870s, showing the history of mining during the late 19th and early 20th centuries. The remote and undeveloped nature of the monument protects these historical sites in nearly their original context.

The monument also contains outstanding biological resources preserved by remoteness and limited travel corridors. The monument is the junction of two physiographic ecoregions: the Mojave Desert and the Colorado Plateau. Individually, these regions contain ecosystems extreme to each other, ranging from stark, arid desert to complex, dramatic higher elevation plateaus, tributaries, and rims of the Grand Canyon. The western margin of the

Shivwits Plateau marks the boundary between the Sonoran/Mojave/Great Basin floristic provinces to the west and south, and the Colorado Plateau province to the northeast. This intersection of these biomes is a distinctive and remarkable feature. Riparian corridors link the plateau to the Colorado River corridor below, allowing wildlife movement and plant dispersal. The Shivwits Plateau is in an arid environment with between 14 to 18 inches of precipitation a year. Giant Mojave Yucca cacti proliferate in undisturbed conditions throughout the monument. Diverse wildlife inhabit the monument, including a trophy-quality mule deer herd, Kaibab squirrels, and wild turkey. There are numerous threatened or endangered species as well, including the Mexican spotted owl, the California condor, the desert tortoise, and the southwestern willow flycatcher. There are also candidate or sensitive species, including the spotted bat, the western mastiff bat, the Townsend's big eared bat, and the goshawk, as well as two federally recognized sensitive rare plant species: Penstemon distans and Rosa stellata. The ponderosa pine ecosystem in the Mt. Trumbull area is a biological resource of scientific interest, which has been studied to gain important insights regarding dendroclimatic reconstruction, fire history, forest structure change, and the long-term persistence and stability of presettlement pine groups.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431) authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be

confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Grand Canyon-Parashant National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Grand Canyon-Parashant National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Grand Canyon-Parashant National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 1,014,000 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

For the purpose of protecting the objects identified above, all motorized and mechanized vehicle use off road will be prohibited, except for emergency or authorized administrative purposes.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Arizona with respect to fish and wildlife management.

The establishment of this monument is subject to valid existing rights.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and

withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument. Sale of vegetative material is permitted only if part of an authorized science-based ecological restoration project. Lands and interests in lands within the proposed monument not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States.

This proclamation does not reserve water as a matter of Federal law nor relinquish any water rights held by the Federal Government existing on this date. The Federal land managing agencies shall work with appropriate State authorities to ensure that water resources needed for monument purposes are available.

The Secretary of the Interior shall manage the monument through the Bureau of Land Management and the National Park Service, pursuant to applicable legal authorities, to implement the purposes of this proclamation. The National Park Service and the Bureau of Land Management shall manage the monument cooperatively and shall prepare an agreement to share, consistent with applicable laws, whatever resources are necessary to properly manage the monument; however, the National Park Service shall continue to have primary management authority over the portion of the monument within the Lake Mead National Recreation Area, and the Bureau of Land Management shall have primary management authority over the remaining portion of the monument.

The Bureau of Land Management shall continue to issue and administer grazing leases within the portion of the monument within the Lake Mead National Recreation Area, consistent with the Lake Mead National Recreation Area authorizing legislation. Laws, regulations, and policies followed by the Bureau of Land Management in issuing and administering grazing leases on all lands under its jurisdiction shall continue to apply to the remaining portion of the monument.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation. Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this eleventh day of January, in the year of our Lord two thousand, and of the Independence of the United States of America the two hundred and twenty-fourth.

/s/ William J. Clinton

[Map Omitted in Printing]

ATTACHMENT 2

Presidential Documents

Federal Register/Vol. 65, No. 114/Tuesday, June 13, 2000

Proclamation 7317 of June 9, 2000

Establishment of the Canyons of the Ancients National Monument

By the President of the United States of America

A Proclamation

Containing the highest known density of archaeological sites in the Nation, the Canyons of the Ancients National Monument holds evidence of cultures and traditions spanning thousands of years. This area, with its intertwined natural and cultural resources, is a rugged landscape, a quality that greatly contributes to the protection of its scientific and historic objects. The monument offers an unparalleled opportunity to observe, study, and experience how cultures lived and adapted over time in the American Southwest.

The complex landscape and remarkable cultural resources of the Canyons of the Ancients National Monument have been a focal point for archaeological interest for over 125 years. Archaeological and historic objects such as cliff dwellings, villages, great kivas, shrines, sacred springs, agricultural fields, check dams, reservoirs, rock art sites, and sweat lodges are spread across the landscape. More than five thousand of these archaeologically important sites have been recorded, and thousands more await documentation and study. The Mockingbird Mesa area has over forty sites per square mile, and several canyons in

that area hold more than three hundred sites per square mile.

People have lived and labored to survive among these canyons and mesas for thousands of years, from the earliest known hunters crossing the area 10,000 years ago or more, through Ancestral Puebloan farmers, to the Ute, Navajo, and European settlers whose descendants still call this area home. There is scattered evidence that Paleo-Indians used the region on a sporadic basis for hunting and gathering until around 7500 B.C. During the Archaic period, generally covering the next six thousand years, occupation of the Four Corners area was dominated by hunters and gatherers.

By about 1500 B.C., the more sedentary Basketmakers spread over the landscape. As Ancestral Northern Puebloan people occupied the area around 750 A.D., farming began to blossom, and continued through about 1300 A.D., as the area became part of a much larger prehistoric cultural region that included Mesa Verde to the southeast. Year-round villages were established, originally consisting of pit house dwellings, and later evolving to well-recognized cliff-dwellings. Many archaeologists now believe that throughout this time span, the Ancestral Northern Puebloan people periodically aggregated into larger communities and dispersed into smaller community units. Specifically, during Pueblo I (about 700-900 A.D.) the occupation and site density in the monument area increased. Dwellings tended to be small, with three or four rooms. Then, during Pueblo II (about 900-1150 A.D.), settlements were diminished and highly dispersed. Late in Pueblo II and in early Pueblo III, around 1150 A.D., the size and number of settlements again increased and residential clustering began. Later pueblos were larger

multi-storied masonry dwellings with forty to fifty rooms. For the remainder of Pueblo III (1150-1300 A.D.), major aggregation occurred in the monument, typically at large sites at the heads of canyons. One of these sites includes remains of about 420 rooms, 90 kivas, a great kiva, and a plaza, covering more than ten acres in all. These villages were wrapped around the upper reaches of canyons and spread down onto talus slopes, enclosed year-round springs and reservoirs, and included low, defensive walls. The changes in architecture and site planning reflected a shift from independent households to a more communal lifestyle.

Farming during the Puebloan period was affected by population growth and changing climate and precipitation patterns. As the population grew, the Ancestral Puebloans expanded into increasingly marginal areas. Natural resources were compromised and poor soil and growing conditions made survival increasingly difficult. When dry conditions persisted, Pueblo communities moved to the south, southwest, and southeast, where descendants of these Ancestral Puebloan peoples live today.

Soon after the Ancestral Puebloans left the monument area, the nomadic Ute and Navajo took advantage of the natural diversity found in the variable topography by moving to lower areas, including the monument's mesas and canyons, during the cooler seasons. A small number of forked stick hogans, brush shelters, and wickiups are the most obvious remnants of this period of occupation.

The natural resources and spectacular land forms of the monument help explain why past and present cultures have chosen to live in the area. The geology of the monument evokes the very essence of the American Southwest.

Structurally part of the Paradox Basin, from a distance the landscape looks deceptively benign. From the McElmo Dome in the southern part of the monument, the land slopes gently to the north, giving no indication of its true character. Once inside the area, however, the geology becomes more rugged and dissected. Rising sharply to the north of McElmo Creek, the McElmo Dome itself is buttressed by sheer sandstone cliffs, with mesa tops rimmed by caprock, and deeply incised canyons.

The monument is home to a wide variety of wildlife species, including unique herpetological resources. Crucial habitat for the Mesa Verde nightsnake, long-nosed leopard lizard, and twin-spotted spiny lizard can be found within the monument in the area north of Yellow Jacket Canyon. Peregrine falcons have been observed in the area, as have golden eagles, American kestrels, red-tailed hawks, and northern harriers. Game birds like Gambel's quail and mourning dove are found throughout the monument both in dry, upland habitats, and in lush riparian habitat along the canyon bottoms.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to

be known as the Canyons of the Ancients National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Canyons of the Ancients National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Canyons of the Ancients National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 164,000 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral leasing, other than by exchange that furthers the protective purposes of the monument, and except for oil and gas leasing as prescribed herein.

For the purpose of protecting the objects identified above, the Secretary of the Interior shall prohibit all motorized and mechanized vehicle use off road, except for emergency or authorized administrative purposes.

Lands and interests in lands within the proposed monument not owned by the United States shall be reserved as

a part of the monument upon acquisition of title thereto by the United States.

Because most of the Federal lands have already been leased for oil and gas, which includes carbon dioxide, and development is already occurring, the monument shall remain open to oil and gas leasing and development; provided, the Secretary of the Interior shall manage the development, subject to valid existing rights, so as not to create any new impacts that interfere with the proper care and management of the objects protected by this proclamation; and provided further, the Secretary may issue new leases only for the purpose of promoting conservation of oil and gas resources in any common reservoir now being produced under existing leases, or to protect against drainage.

The Secretary of the Interior shall prepare a transportation plan that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in this proclamation.

The Secretary of the Interior shall manage the monument through the Bureau of Land Management, pursuant to applicable legal authorities, to implement the purposes of this proclamation.

The establishment of this monument is subject to valid existing rights.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Colorado with respect to fish and wildlife management.

This proclamation does not reserve water as a matter of Federal law. Nothing in this reservation shall be construed as a relinquishment or reduction of any water use or rights reserved or appropriated by the United States on or

before the date of this proclamation. The Bureau of Land Management shall work with appropriate State authorities to ensure that any water resources needed for monument purposes are available.

Nothing in this proclamation shall be deemed to enlarge or diminish the rights of any Indian tribe.

Laws, regulations, and policies followed by the Bureau of Land Management in issuing and administering grazing permits or leases on all lands under its jurisdiction shall continue to apply with regard to the lands in the monument.

Nothing in this proclamation shall be deemed to affect the management of Hovenweep National Monument by the National Park Service (Proclamation 1654 of March 2, 1923, Proclamation 2924 of May 1, 1951, and Proclamation 2998 of November 26, 1952).

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of June, in the year of our Lord two thousand, and of the Independence of the United States of America the two hundred and twenty-fourth.

(Presidential Sig.)

[Map Omitted In Printing]

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ATTACHMENT 3

Federal Register/Vol. 65, No. 114/Tuesday, June 13, 2000

Presidential Documents

Proclamation 7318 of June 9, 2000

Establishment of the Cascade-Siskiyou National Monument

By the President of the United States of America

A Proclamation

With towering fir forests, sunlit oak groves, wildflower-strewn meadows, and steep canyons, the Cascade-Siskiyou National Monument is an ecological wonder, with biological diversity unmatched in the Cascade Range. This rich enclave of natural resources is a biological crossroads – the interface of the Cascade, Klamath, and Siskiyou ecoregions, in an area of unique geology, biology, climate, and topography.

The monument is home to a spectacular variety of rare and beautiful species of plants and animals, whose survival in this region depends upon its continued ecological integrity. Plant communities present a rich mosaic of grass and shrublands, Garry and California black oak woodlands, juniper scablands, mixed conifer and white fir forests, and wet meadows. Stream bottoms support broadleaf deciduous riparian trees and shrubs. Special plant communities include rosaceous chaparral and oak-juniper woodlands. The monument also contains many rare and endemic plants, such as Greene's Mariposa lily, Gentner's fritillary, and Bellinger's meadowfoam.

The monument supports an exceptional range of fauna, including one of the highest diversities of butterfly species in the United States. The Jenny Creek portion of the monument is a significant center of fresh water snail diversity, and is home to three endemic fish species, including a long-isolated stock of redband trout. The monument contains important populations of small mammals, reptile and amphibian species, and ungulates, including important winter habitat for deer. It also contains old growth habitat crucial to the threatened Northern spotted owl and numerous other bird species such as the western bluebird, the western meadowlark, the pileated woodpecker, the flammulated owl, and the pygmy nuthatch.

The monument's geology contributes substantially to its spectacular biological diversity. The majority of the monument is within the Cascade Mountain Range. The western edge of the monument lies within the older Klamath Mountain geologic province. The dynamic plate tectonics of the area, and the mixing of igneous, metamorphic, and sedimentary geological formations, have resulted in diverse lithologies and soils. Along with periods of geological isolation and a range of environmental conditions, the complex geologic history of the area has been instrumental in producing the diverse vegetative and biological richness seen today.

One of the most striking features of the Western Cascades in this area is Pilot Rock, located near the southern boundary of the monument. The rock is a volcanic plug, a remnant of a feeder vent left after a volcano eroded away, leaving an outstanding example of the inside of a volcano. Pilot Rock has sheer, vertical basalt faces up to 400 feet

above the talus slope at its base, with classic columnar jointing created by the cooling of its andesite composition.

The Siskiyou Pass in the southwest corner of the monument contains portions of the Oregon/California Trail, the region's main north/south travel route first established by Native Americans in prehistoric times, and used by Peter Skene Ogden in his 1827 exploration for the Hudson's Bay Company.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Cascade-Siskiyou National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Cascade-Siskiyou National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Cascade-Siskiyou National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved

consist of approximately 52,000 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

There is hereby reserved, as of the date of this proclamation and subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established. Nothing in this reservation shall be construed as a relinquishment or reduction of any water use or rights reserved or appropriated by the United States on or before the date of this proclamation.

The commercial harvest of timber or other vegetative material is prohibited, except when part of an authorized science-based ecological restoration project aimed at meeting protection and old growth enhancement objectives. Any such project must be consistent with the purposes of this proclamation. No portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber. Removal of trees from within the monument area may take place only if clearly needed for ecological restoration and maintenance or public safety.

For the purpose of protecting the objects identified above, the Secretary of the Interior shall prohibit all motorized and mechanized vehicle use off road and shall close the Schoheim Road, except for emergency or authorized administrative purposes.

Lands and interests in lands within the proposed monument not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States.

The Secretary of the Interior shall manage the monument through the Bureau of Land Management, pursuant to applicable legal authorities (including, where applicable, the Act of August 28, 1937, as amended (43 U.S.C. 1181a-1181j)), to implement the purposes of this proclamation.

The Secretary of the Interior shall prepare, within 3 years of this date, a management plan for this monument, and shall promulgate such regulations for its management as he deems appropriate. The management plan shall include appropriate transportation planning that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in this proclamation.

The Secretary of the Interior shall study the impacts of livestock grazing on the objects of biological interest in the monument with specific attention to sustaining the natural ecosystem dynamics. Existing authorized permits or leases may continue with appropriate terms and conditions under existing laws and regulations. Should grazing be found incompatible with protecting the objects of biological interest, the Secretary shall retire the grazing allotments pursuant to the processes of applicable law. Should grazing permits or leases be relinquished by

existing holders, the Secretary shall not reallocate the forage available under such permits or for livestock grazing purposes unless the Secretary specifically finds, pending the outcome of the study, that such reallocation will advance the purposes of the proclamation.

The establishment of this monument is subject to valid existing rights.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Oregon with respect to fish and wildlife management.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of June, in the year of our Lord two thousand, and of the Independence of the United States of America the two hundred and twenty-fourth.

/s/ William J. Clinton

[Map Omitted In Printing]

ATTACHMENT 4

Federal Register/Vol. 65, No. 114/Tuesday, June 13, 2000

Presidential Documents

Proclamation 7319 of June 9, 2000

Establishment of the Hanford Reach National Monument

By the President of the United States of America

A Proclamation

The Hanford Reach National Monument is a unique and biologically diverse landscape, encompassing an array of scientific and historic objects. This magnificent area contains an irreplaceable natural and historic legacy, preserved by unusual circumstances. Maintained as a buffer area in a Federal reservation conducting nuclear weapons development and, more recently, environmental cleanup activities, with limits on development and human use for the past 50 years, the monument is now a haven for important and increasingly scarce objects of scientific and historic interest. Bisected by the stunning Hanford Reach of the Columbia River, the monument contains the largest remnant of the shrub-steppe ecosystem that once blanketed the Columbia River Basin. The monument is also one of the few remaining archaeologically rich areas in the western Columbia Plateau, containing well-preserved remnants of human history spanning more than 10,000 years. The monument is equally rich in geologic history, with dramatic landscapes that reveal the creative forces of tectonic, volcanic, and erosive power.

The monument is a biological treasure, embracing important riparian, aquatic, and upland shrub-steppe habitats

that are rare or in decline in other areas. Within its mosaic of habitats, the monument supports a wealth of increasingly uncommon native plant and animal species, the size and diversity of which is unmatched in the Columbia Basin. Migrating salmon, birds, and hundreds of other native plant and animal species rely on its natural ecosystems.

The monument includes the 51-mile long "Hanford Reach," the last free-flowing, nontidal stretch of the Columbia River. The Reach contains islands, riffles, gravel bars, oxbow ponds, and backwater sloughs that support some of the most productive spawning areas in the Northwest, where approximately 80 percent of the upper Columbia Basin's fall chinook salmon spawn. It also supports healthy runs of naturally-spawning sturgeon and other highly-valued fish species. The loss of other spawning grounds on the Columbia and its tributaries has increased the importance of the Hanford Reach for fisheries.

The monument contains one of the last remaining large blocks of shrub-steppe ecosystems in the Columbia River Basin, supporting an unusually high diversity of native plant and animal species. A large number of rare and sensitive plant species are found dispersed throughout the monument. A recent inventory resulted in the discovery of two plant species new to science, the Umtanum desert buckwheat and the White Bluffs bladderpod. Fragile microbiotic crusts, themselves of biological interest, are well developed in the monument and play an important role in stabilizing soils and providing nutrients to plants.

The monument contains significant breeding populations of nearly all steppe and shrub-steppe dependent birds, including the loggerhead shrike, the sage sparrow, the

sage thrasher, and the ferruginous hawk. The Hanford Reach and surrounding wetlands provide important stop-over habitat for migratory birds, as well as habitat for many resident species. The area is important wintering habitat for bald eagles, white pelicans, and many species of waterfowl such as mallards, green-winged teal, pintails, goldeneye, gadwall, and buffleheads. The monument's bluff habitats provide valuable nesting sites for several bird species, including prairie falcons, and important perch sites for raptors such as peregrine falcons.

Many species of mammals are also found within the monument, including elk, beaver, badgers, and bobcats. Insect populations, though less conspicuous, include species that have been lost elsewhere due to habitat conversion, fragmentation, and application of pesticides. A recent biological inventory uncovered 41 species and 2 subspecies of insects new to science and many species not before identified in the State of Washington. Such rich and diverse insect populations are important to supporting the fauna in the monument.

In addition to its vital biological resources, the monument contains significant geological and paleontological objects. The late-Miocene to late-Pliocene Ringold Formation, known as the White Bluffs, was formed from river and lake sediments deposited by the ancestral Columbia River and its tributaries. These striking cliffs form the eastern bank of the Columbia for nearly half of the length of the Reach, and are significant for the mammalian fossils that they contain. Fossil remains from rhinoceros, camel, and mastodon, among others, have been found within these bluffs.

The Hanford Dune Field, located on the western shore of the Columbia in the southeastern part of the monument, is also of geologic significance. This active area of migrating barchan dunes and partially stabilized transverse dunes rises 10 to 16 feet above the ground, creating sandy habitats ranging from 2 to several hundred acres in size.

The monument also contains important archaeological and historic information. More than 10,000 years of human activity in this largely arid environment have left extensive archaeological deposits. Areas upland from the river show evidence of concentrated human activity, and recent surveys indicate extensive use of arid lowlands for hunting. Hundreds of prehistoric archaeological sites have been recorded, including the remains of pithouses, graves, spirit quest monuments, hunting camps, game drive complexes, quarries, and hunting and kill sites. A number of Native American groups still have cultural ties to the monument. The monument also contains some historic structures and other remains from more recent human activities, including homesteads from small towns established along the riverbanks in the early 20th century.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Hanford Reach National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Hanford Reach National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Hanford Reach National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 195,000 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

For the purpose of protecting the objects identified above, the Secretary of the Interior and the Secretary of Energy shall prohibit all motorized and mechanized vehicle use off road, except for emergency or other federally authorized purposes, including remediation purposes. There is hereby reserved, as of the date of this proclamation and subject to

valid existing rights, a quantity of water in the Columbia River sufficient to fulfill the purposes for which this monument is established. Nothing in this reservation shall be construed as a relinquishment or reduction of any water use or rights reserved or appropriated by the United States on or before the date of this proclamation.

For the purpose of protecting the objects identified above, the Secretary of the Interior shall prohibit livestock grazing.

The monument shall be managed by the U.S. Fish and Wildlife Service under existing agreements with the Department of Energy, except that the Department of Energy shall manage the lands within the monument that are not subject to management agreements with the Service, and in developing any management plans and rules and regulations governing the portions of the monument for which the Department of Energy has management responsibility, the Secretary of Energy shall consult with the Secretary of the Interior.

As the Department of Energy and the U.S. Fish and Wildlife Service determine that lands within the monument managed by the Department of Energy become suitable for management by the U.S. Fish and Wildlife Service, the U.S. Fish and Wildlife Service will assume management by agreement with the Department of Energy. All agreements between the U.S. Fish and Wildlife Service and the Department of Energy shall be consistent with the provisions of this proclamation.

Nothing in this proclamation shall affect the responsibility of the Department of Energy under environmental laws, including the remediation of hazardous substances or the restoration of natural resources at the Hanford facility;

nor affect the Department of Energy's statutory authority to control public access or statutory responsibility to take other measures for environmental remediation, monitoring, security, safety, or emergency preparedness purposes; nor affect any Department of Energy activities on lands not included within the monument.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Washington with respect to fish and wildlife management.

Nothing in this proclamation shall enlarge or diminish the rights of any Indian tribe.

The establishment of this monument is subject to valid existing rights.

Nothing in this proclamation shall interfere with the operation and maintenance of existing facilities of the Columbia Basin Reclamation Project, the Federal Columbia River Transmission System, or other existing utility services that are located within the monument. Existing Federal Columbia River Transmission System facilities located within the monument may be replaced, modified and expanded, and new facilities constructed within the monument, as authorized by other applicable law. Such replacement, modification, expansion, or construction of new facilities shall be carried out in a manner consistent with proper care and management of the objects of this proclamation, to be determined in accordance with the management arrangements previously set out in this proclamation.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation;

however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of June, in the year of our Lord two thousand, and of the Independence of the United States of America the two hundred and twenty-fourth.

/s/ William J. Clinton

[Map Omitted In Printing]

ATTACHMENT 5

Federal Register/Vol. 65, No. 114/Tuesday, June 13, 2000

Presidential Documents

Proclamation 7320 of June 9, 2000

Establishment of the Ironwood Forest National Monument

By the President of the United States of America

A Proclamation

The landscape of the Ironwood Forest National Monument is swathed with the rich, drought-adapted vegetation of the Sonoran Desert. The monument contains objects of scientific interest throughout its desert environment. Stands of ironwood, palo verde, and saguaro blanket the monument floor beneath the rugged mountain ranges, including the Silver Bell Mountains. Ragged Top Mountain

is a biological and geological crown jewel amid the depositional plains in the monument.

The monument presents a quintessential view of the Sonoran Desert with ancient legume and cactus forests. The geologic and topographic variability of the monument contributes to the area's high biological diversity. Ironwoods, which can live in excess of 800 years, generate a chain of influences on associated understory plants, affecting their dispersal, germination, establishment, and rates of growth. Ironwood is the dominant nurse plant in this region, and the Silver Bell Mountains support the highest density of ironwood trees recorded in the Sonoran Desert. Ironwood trees provide, among other things, roosting sites for hawks and owls, forage for desert bighorn sheep, protection for saguaro against freezing, burrows for tortoises, flowers for native bees, dense canopy for nesting of white-winged doves and other birds, and protection against sunburn for night blooming cereus.

The ironwood-bursage habitat in the Silver Bell Mountains is associated with more than 674 species, including 64 mammalian and 57 bird species. Within the Sonoran Desert, Ragged Top Mountain contains the greatest richness of species. The monument is home to species federally listed as threatened or endangered, including the Nichols turk's head cactus and the lesser long-nosed bat, and contains historic and potential habitat for the cactus ferruginous pygmy-owl. The desert bighorn sheep in the monument may be the last viable population indigenous to the Tucson basin.

In addition to the biological and geological resources, the area holds abundant rock art sites and other archeological objects of scientific interest. Humans have inhabited the

area for more than 5,000 years. More than 200 sites from the prehistoric Hohokam period (600 A.D. to 1450 A.D.) have been recorded in the area. Two areas within the monument have been listed on the National Register of Historic Places, the Los Robles Archeological District and the Cocoraque Butte Archeological District. The archeological artifacts include rhyolite and brown chert chipped stone, plain and decorated ceramics, and worked shell from the Gulf of California. The area also contains the remnants of the Mission Santa Ana, the last mission constructed in Pimeria Alta.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Ironwood Forest National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Ironwood Forest National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described

on the map entitled "Ironwood Forest National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 128,917 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

For the purpose of protecting the objects identified above, the Secretary of the Interior shall prohibit all motorized and mechanized vehicle use off road, except for emergency or authorized administrative purposes.

Lands and interests in lands within the proposed monument not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States.

The Secretary of the Interior shall manage the monument through the Bureau of Land Management, pursuant to applicable legal authorities, to implement the purposes of this proclamation.

The Secretary of the Interior shall prepare a transportation plan that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in this proclamation.

The establishment of this monument is subject to valid existing rights.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Arizona with respect to fish and wildlife management.

This proclamation does not reserve water as a matter of Federal law. Nothing in this reservation shall be construed as a relinquishment or reduction of any water use or rights reserved or appropriated by the United States on or before the date of this proclamation. The Bureau of Land Management shall work with appropriate State authorities to ensure that any water resources needed for monument purposes are available.

Nothing in this proclamation shall be deemed to enlarge or diminish the rights of any Indian tribe.

Laws, regulations, and policies followed by the Bureau of Land Management in issuing and administering grazing permits or leases on all lands under its jurisdiction shall continue to apply with regard to the lands in the monument.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of June, in the year of our Lord two thousand, and

of the Independence of the United States of America the two hundred and twenty-fourth.

/s/ William J. Clinton

[Map Omitted In Printing]

ATTACHMENT 6

Federal Register/Vol. 66, No. 14/January 22, 2001

Presidential Documents

Proclamation 7397 of January 17, 2001

Establishment of the Sonoran Desert National Monument

By the President of the United States of America

A Proclamation

The Sonoran Desert National Monument is a magnificent example of untrammeled Sonoran desert landscape. The area encompasses a functioning desert ecosystem with an extraordinary array of biological, scientific, and historic resources. The most biologically diverse of the North American deserts, the monument consists of distinct mountain ranges separated by wide valleys, and includes large saguaro cactus forest communities that provide excellent habitat for a wide range of wildlife species.

The monument's biological resources include a spectacular diversity of plant and animal species. The higher peaks include unique woodland assemblages, while the lower elevation lands offer one of the most structurally complex examples of palo verde/mixed cacti association in the Sonoran Desert. The dense stands of leguminous trees and

cacti are dominated by saguaros, palo-verde trees, ironwood, prickly pear, and cholla. Important natural water holes, known as tinajas, exist throughout the monument. The endangered acuna pineapple cactus is also found in the monument.

The most striking aspect of the plant communities within the monument are the abundant saguaro cactus forests. The saguaro is a signature plant of the Sonoran Desert. Individual saguaro plants are indeed magnificent, but a forest of these plants, together with the wide variety of trees, shrubs, and herbaceous plants that make up the forest community, is an impressive site to behold. The saguaro cactus forests within the monument are a national treasure, rivaling those within the Saguaro National Park.

The rich diversity, density, and distribution of plants in the Sand Tank Mountains area of the monument is especially striking and can be attributed to the management regime in place since the area was withdrawn for military purposes in 1941. In particular, while some public access to the area is allowed, no livestock grazing has occurred for nearly 50 years. To extend the extraordinary diversity and overall ecological health of the Sand Tanks Mountains area, land adjacent and with biological resources similar to the area withdrawn for military purposes should be subject to a similar management regime to the fullest extent possible.

The monument contains an abundance of packrat middens, allowing for scientific analysis of plant species and climates in past eras. Scientific analysis of the midden shows that the area received far more precipitation 20,000 years ago, and slowly became more arid. Vegetation for the

area changed from juniper-oak-pinion pine woodland to the vegetation found today in the Sonoran Desert, although a few plants from the more mesic period, including the Kofa Mountain barberry, Arizona rosewood, and junipers, remain on higher elevations of north-facing slopes.

The lower elevations and flatter areas of the monument contain the creosote-bursage plant community. This plant community thrives in the open expanses between the mountain ranges, and connects the other plant communities together. Rare patches of desert grassland can also be found throughout the monument, especially in the Sand Tank Mountains area. The washes in the area support a much denser vegetation community than the surrounding desert, including mesquite, ironwood, paloverde, desert honeysuckle, chuperosa, and desert willow, as well as a variety of herbaceous plants. This vegetation offers the dense cover bird species need for successful nesting, foraging, and escape, and birds heavily use the washes during migration.

The diverse plant communities present in the monument support a wide variety of wildlife, including the endangered Sonoran pronghorn, a robust population of desert bighorn sheep, especially in the Maricopa Mountains area, and other mammalian species such as mule deer, javelina, mountain lion, gray fox, and bobcat. Bat species within the monument include the endangered lesser long-nosed bat, the California leaf-nosed bat, and the cave myotis. Over 200 species of birds are found in the monument, including 59 species known to nest in the Vekol Valley area. Numerous species of raptors and owls inhabit the monument, including the elf owl and the western screech owl. The monument also supports a diverse array of reptiles and

amphibians, including the Sonoran desert tortoise and the red-backed whiptail. The Bureau of Land Management has designated approximately 25,000 acres of land in the Maricopa Mountains area as critical habitat for the desert tortoise. The Vekol Valley and Sand Tank Mountain areas contain especially diverse and robust populations of amphibians. During summer rainfall events, thousands of Sonoran green toads in the Vekol Valley can be heard moving around and calling out.

The monument also contains many significant archaeological and historic sites, including rock art sites, lithic quarries, and scattered artifacts. Vekol Wash is believed to have been an important prehistoric travel and trade corridor between the Hohokam and tribes located in what is now Mexico. Signs of large villages and permanent habitat sites occur throughout the area, and particularly along the bajadas of the Table Top Mountains. Occupants of these villages were the ancestors of today's O'odham, Quechan, Cocopah, Maricopa, and other tribes. The monument also contains a much used trail corridor 23 miles long in which are found remnants of several important historic trails, including the Juan Bautista de Anza National Historic Trail, the Mormon Battalion Trail, and the Butterfield Overland Stage Route.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be

confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS, it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Sonoran Desert National Monument.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Sonoran Desert National Monument, for the purpose of protecting the objects identified above, all lands and interest in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Sonoran Desert National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 486,149 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

For the purpose of protecting the objects identified above, all motorized and mechanized vehicle use off road will be prohibited, except for emergency or authorized administrative purposes.

Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Arizona with respect to fish and wildlife management.

The establishment of this monument is subject to valid existing rights.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale,

or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument. Lands and interests in lands within the monument not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States.

This proclamation does not reserve water as a matter of Federal law nor relinquish any water rights held by the Federal Government existing on this date. The Federal land management agencies shall work with appropriate State authorities to ensure that water resources needed for monument purposes are available.

The Secretary of the Interior shall manage the monument through the Bureau of Land Management, pursuant to applicable legal authorities, to implement the purposes of this proclamation. That portion identified as Area A on the map, however, shall be managed under the management arrangement established by section 3 of Public Law No. 99-606, 100 Stat. 3460-61, until November 6, 2001, at which time, pursuant to section 5(a) of Public Law No. 99-606, 100 Stat. 3462-63, the military withdrawal terminates. At that time, the Secretary of the Interior shall assume management responsibility for Area A through the Bureau of Land Management.

The Secretary of the Interior shall prepare a management plan that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in this proclamation.

Laws, regulations, and policies followed by the Bureau of Land Management in issuing and administering grazing permits or leases on all lands under its jurisdiction shall continue to apply with regard to the lands in the monument; provided, however, that grazing permits on Federal lands within the monument south of Interstate Highway 8 shall not be renewed at the end of their current term; and provided further, that grazing on Federal lands north of Interstate 8 shall be allowed to continue only to the extent that the Bureau of Land Management determines that grazing is compatible with the paramount purpose of protecting the objects identified in this proclamation.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Nothing in this proclamation shall preclude low level overflights of military aircraft, the designation of new units of special use airspace, or the use or establishment of military flight training routes over the lands included in this proclamation.

In order to protect the public during operations at the adjacent Barry M. Goldwater Range, and to continue management practices that have resulted in an exceptionally well preserved natural resource, the current procedures for public access to the portion of the monument depicted as Area A on the attached map shall remain in full force and effect, except to the extent that the United States Air Force agrees to different procedures which the Bureau of Land Management determines are compatible with the protection of the objects identified in this proclamation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of January, in the year of our Lord two thousand one, and of the Independence of the United States of America the two hundred and twenty-fifth.

(Presidential Sig.)

306 F.3d 1138

United States Court of Appeals,
District of Columbia Circuit.

TULARE COUNTY, et al., Appellants,
v.
George W. BUSH, in his official capacity as President of the United States of America, et al., Appellees.
Natural Resources Defense Council, et al., Intervenors.

No. 01-5376.

Argued Sept. 5, 2002.
Decided Oct. 18, 2002.

Gary G. Stevens argued the cause and filed the briefs for appellants.

Susan Pacholski, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were Ellen J. Durkee, Michael Gheleta and Ann Navaro, Attorneys, U.S. Department of Justice.

Andrew E. Wetzler argued the cause for intervenors Natural Resources Defense Council, et al. With him on the brief were Nathaniel S.W. Lawrence, Michael R. Sherwood, Anne Harper and James S. Pew.

Raissa S. Lerner, Deputy Attorney General, Attorney General's Office of the State of California, argued the cause for intervenor People of the State of California. With her on the brief were Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General and Theodora Berger, Senior Assistant Attorney General.

Before: EDWARDS and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

This is the second case we decide today involving a challenge to Presidential authority under the Antiquities Act of 1906 ("Act"), 16 U.S.C. § 431 (2000). In *Mountain States v. Bush,* 306 F.3d 1132 (D.C.Cir.2002), the court, upon *de novo* review, affirmed the dismissal of the complaint, holding that the complaint, which challenged a series of monument designations under the Act, contained insufficient factual allegations under Federal Rule of Civil Procedure 8(a) to trigger *ultra vires* review of the President's Proclamations. *Id.* at 8-10. The court also held that the complaint failed as a matter of law insofar as it alleged that the Proclamations violated the plain terms of the Antiquities Act and other federal statutes. *Id.* at 8, 10-11. We likewise hold, upon *de novo* review, that the complaint in the instant case fails for the same reasons. Accordingly, we affirm the dismissal of the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I.

In April 2000 President Clinton established by proclamation the Giant Sequoia National Monument pursuant to his authority under the Antiquities Act. Proclamation 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000). The Monument, which encompasses 327,769 acres of land in the Sequoia National Forest in south-central California, contains groves of giant sequoias, the world's largest trees, and their surrounding ecosystem. *Id.* at 24,095-97, 24,100.

Tulare County, which contains land near and within the Grand Sequoia National Monument ("Monument"), along with a number of other public and private entities that use the Monument area for business or recreational purposes (hereinafter "Tulare County"), filed a complaint seeking declaratory and injunctive relief. Tulare County alleged that the Proclamation violated various provisions of the Antiquities Act and the Property Clause of the Constitution, as well as the National Forest Management Act, the National Environmental Policy Act, and the parties' existing rights under a prior mediated settlement agreement. The district court, concluding that only facial review was appropriate, dismissed the complaint. *Tulare County v. Bush,* 185 F.Supp.2d 18 (D.D.C.2001).

II.

On appeal, Tulare County contends that in dismissing its complaint prior to discovery, the district court erred in failing to accept as true the facts alleged in the complaint and in limiting its review to the face of the Proclamation rather than reviewing the President's discretionary factual determinations. Tulare County does not contend that the President lacks authority under the Antiquities Act to proclaim national monuments like Giant Sequoia, as the Supreme Court has long upheld such authority. *Cappaert v. United States,* 426 U.S. 128, 142, 96 S.Ct. 2062, 2071, 48 L.Ed.2d 523 (1976); *Cameron v. United States,* 252 U.S. 450, 455, 40 S.Ct. 410, 410-11, 64 L.Ed. 659 (1920). Rather, in Counts 1-4 of the complaint, Tulare County alleged that the Proclamation violated the Antiquities Act because it: (1) failed to identify the objects of historic or scientific interest with reasonable specificity; (2) designated as the basis for the Monument objects that do not qualify under

the Act; (3) did not confine the size of the Monument "to the smallest area compatible with proper care and management of the objects to be protected," 16 U.S.C. § 431; and (4) increased the likelihood of harm by fires to any objects of alleged historic or scientific interest within the Monument rather than protecting those objects. In Count 5, Tulare County argued that, absent judicial review of the President's action under the Antiquities Act, the statute constitutes an unconstitutional delegation of congressional authority. The remaining counts alleged that other federal statutes barred the Proclamation and that the Proclamation violated extant legal rights arising from a mediated settlement agreement with the National Forest Service prior to the Proclamation.

The Antiquities Act provides, in relevant part, that the President, "in his discretion" may declare "historic landmarks . . . and other objects of historic or scientific interest . . . situated upon [federal] lands . . . to be national monuments, and may reserve . . . parcels of land . . . confined to the smallest area compatible with the proper care and management of the objects to be protected. . . . " 16 U.S.C. § 431. The court pointed out in *Mountain States,* after reviewing Supreme Court authority discussing the scope of judicial review of discretionary Presidential decisionmaking, that the court "is necessarily sensitive to pleading requirements where, as here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented." *Mountain States,* 306 F.3d at 1137. Acknowledging that Congress has entrusted the courts with responsibility for determining the limits of statutory grants of authority, *id.* at 8, the court nonetheless declined to engage in *ultra vires* review in light of the

absence of allegations or arguments in the record to indicate any infirmity in the challenged Proclamations. *Id.* at 9. Consequently, we review Tulare County's complaint to determine whether it contains factual allegations to support an *ultra vires* claim that would demonstrate the district court erred in declining to engage in a factual inquiry to ensure that the President complied with the statutory requirements.

Count 1 of Tulare County's complaint is premised on the assumption that the Antiquities Act requires the President to include a certain level of detail in the Proclamation. No such requirement exists. The Act authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." 16 U.S.C. § 431. The Presidential declaration at issue complies with that standard. The Proclamation lyrically describes "magnificent groves of towering giant sequoias," "bold granitic domes, spires, and plunging gorges," "an enormous number of habitats," "limestone caverns and . . . unique paleontological resources documenting tens of thousands of years of ecosystem change," as well as "many archaeological sites recording Native American occupation . . . and historic remnants of early Euroamerican settlement." Proclamation at 24,095. By identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard. Hence, Count 1 fails as a matter of law.

Count 2 alleges that the President has designated nonqualifying objects for protection. The Antiquities Act provides that, in addition to historic landmarks and structures, "other objects of historic or scientific interest" may qualify, at the President's discretion, for protection as

monuments. 16 U.S.C. § 431. Inclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on non-qualifying features. In *Cappaert,* 426 U.S. at 141-42, 96 S.Ct. at 2070-71, the Supreme Court rejected a similar argument, holding that the President's Antiquities Act authority is not limited to protecting only archeological sites.

As relevant to Count 3 of the complaint, the Proclamation states that the Monument's 327,769-acre size "is the smallest area compatible with the proper care and management of the objects to be protected." Proclamation at 24,097. It also states that the sequoia groves are not contiguous but instead comprise part of a spectrum of interconnected ecosystems. *Id.* Tulare County alleges that no one in the Clinton Administration "made any meaningful investigation or determination of the smallest area necessary to protect any specifically identified objects of genuine historic or scientific interest." Compl. ¶ 149. Instead, it alleges, President Clinton "bowed to political pressure . . . in designating a grossly oversized Monument unnecessary for the protection of any objects of genuine historic or scientific interest." Compl. ¶ 150. This allegation is a legal conclusion couched as a factual allegation. "Although in reviewing the dismissal of a complaint the court must take 'all factual allegations in the complaint as true,' the court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Mountain States,* 306 F.3d at 1137 (quoting *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 2944, 92 L.Ed.2d 209 (1986)).

Contrary to the assumption underlying Count 3, the Antiquities Act does not impose upon the President an

obligation to make any particular investigation. And to the extent that Tulare County alleges that the Proclamation designates land that should not be included within the Monument, the complaint fails to identify the improperly designated lands with sufficient particularity to state a claim. *Id.* Insofar as Tulare County alleges that the Monument includes too much land, i.e., that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest, Tulare County does not make the factual allegations sufficient to support its claims. This is particularly so as its claim that the Proclamation covered too much land is dependent on the proposition that parts of the Monument lack scientific or historical value, an issue on which Tulare County made no factual allegations. *Cf. Dalton v. Specter,* 511 U.S. 462, 473-74, 114 S.Ct. 1719, 1726-27, 128 L.Ed.2d 497 (1994); *United States v. George S. Bush & Co.,* 310 U.S. 371, 379, 60 S.Ct. 944, 946, 84 L.Ed. 1259 (1940).

Count 4 of the complaint alleges that the Monument designation actually increases the risk of harm from fires to many of the objects that the Proclamation aims to protect. However, the Proclamation expressly addresses the threat of wildfires and the need for forest restoration and protection. The Proclamation observes that forest renewal is needed because environmental change "has led to an unprecedented failure in sequoia reproduction," and that "a century of fire suppression and logging" has created "an increased hazard of wildfires of a severity that was rarely encountered in pre-Euroamerican times." Proclamation at 24,095. Count 4 contains no factual allegations, only conclusions, *see, e.g.,* Compl. ¶ 160, and it refers to current management rather than the designation

under the Proclamation as the cause for likely increases in catastrophic fires, Compl. ¶ 159.

Count 5, alleging that if judicial review is not available under the Antiquities Act then the Act violates the Property Clause of the Constitution as an improper delegation of congressional authority to the President, fares no better. As the court held in *Mountain States,* "[n]o Constitutional Property Clause claim is before us, as the President exercised his delegated powers under the Antiquities Act, and that statute includes intelligible principles to guide the President's action." 306 F.3d at 1136-37 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474, 121 S.Ct. 903, 913, 149 L.Ed.2d 1 (2000); *Dalton,* 511 U.S. at 473-74 & n. 6, 114 S.Ct. at 1726-27 & n. 6).

Tulare County's remaining contentions, involving other federal statutes and contractual rights, fail as a matter of law. Contrary to Count 6 of the complaint, the Proclamation does not violate the National Forest Management Act of 1976 ("NFMA"), Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), by unlawfully withdrawing land from the national forest system. The NFMA provides that no national forest land "shall be returned to the public domain except by an act of Congress." 16 U.S.C. § 1609(a). The Proclamation states that "[a]ll federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws. . . . " Proclamation at 24,097. The Proclamation also states that "[n]othing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation." *Id.* at

24,098. The Proclamation thus conceives of the designated land as having a dual status as part of both the Monument and the Sequoia National Forest. *Cameron,* 252 U.S. at 455, 40 S.Ct. at 410-11; *Tulare County,* 185 F.Supp.2d at 27. *Compare United States v. California,* 436 U.S. 32, 40, 98 S.Ct. 1662, 1666, 56 L.Ed.2d 94 (1978). The Proclamation is therefore wholly consistent with NFMA.

Tulare County alleges alternatively, in Counts 7 and 8, that if the Proclamation did not remove land from the national forest system, then the current management of the Monument by the National Forest Service violates the NFMA and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332 (2000). Neither NFMA nor NEPA provides a cause of action, so the claims must be brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2000). Because Presidential actions, of course, are not subject to APA review, *Franklin v. Massachusetts,* 505 U.S. 788, 800-01, 112 S.Ct. 2767, 2775-76, 120 L.Ed.2d 636 (1992), Tulare County attempts to overcome this bar by challenging the non-presidential actions of the Forest Service, referring to two Forest Service documents – an internal Forest Service memorandum interpreting the Proclamation and an interim plan that directs the day-to-day management of the Monument – allegedly showing that the Service is not acting consistently with the Proclamation. Although Tulare County refers to the existence of foresters on the ground, the complaint does not identify these foresters' acts with sufficient specificity to state a claim.

Finally, regarding Count 9, the Proclamation explicitly states that "the establishment of the monument is subject to valid existing rights." Proclamation at 24,097. Tulare County alleges that the Proclamation violates existing

rights that were established by the Mediated Settlement Agreement in 1990, which provided that commercial logging would continue to be available in the Converse Basin area of the Monument. Tulare County ignores the fact that the settlement agreement did not create in any of the parties a right to actual timber harvest, *cf. Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 733, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998), and it failed to allege that any of the appellants possesses a contract for timber harvest. The allegation that the Proclamation violates the Sequoia National Forest Trail Plan likewise fails for lack of sufficient particularity.

Accordingly, because "[a]t no point has [Tulare County] presented factual allegations that would occasion . . . *ultra vires* review of the Proclamation[ ]" *Mountain States,* 306 F.3d at 1136-37, we affirm the dismissal of the complaint.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5376 **September Term, 2002**
00cv02560

Filed On: February 4, 2003

TULARE COUNTY, ET AL.,
APPELLANTS

v.

GEORGE W. BUSH, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.,
APPELLEES

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.,
INTERVENORS

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.*

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk

Statement of the Panel

PER CURIAM: Contrary to Tulare County's argument, the court examined the complaint against a no more rigorous standard of pleading than that of Fed. R. Civ. P. 8(a). The court affirmed the district court's dismissal, for example, of Count III of the complaint because it contained no factual allegations that any part of the Monument lacked scientific or historical value. The allegation that Sequoia groves comprise only six percent of the Monument might well have been sufficient if the President had identified only Sequoia groves for protection, but he did not; the Proclamation covered natural resources present throughout the Monument area. It was therefore incumbent upon Tulare County to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect. That, and nothing more, is what led the court to conclude that the complaint did not identify improperly designated lands "with sufficient particularity."

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* A separate statement of the panel is attached.

(2)

JUL 2 2003

No. 02-1590

In the Supreme Court of the United States

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,
PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

Petitioners have challenged six presidential proclamations designating specified tracts of federal land as national monuments. In issuing those proclamations, the President acted pursuant to the Antiquities Act of 1906, which authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" situated upon federal land "to be national monuments." 16 U.S.C. 431. The question presented is as follows:

Whether the court of appeals correctly held that petitioners had failed adequately to preserve their current claim that the challenged proclamations did not comply with the criteria set forth in the Antiquities Act of 1906.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 306 F.3d 1132.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14-15) was entered on October 18, 2002. A petition for rehearing was denied on January 30, 2003 (Pet. App. 32-33). The petition for a writ of certiorari was filed on April 30, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Antiquities Act of 1906 (Antiquities Act or Act), 16 U.S.C. 431 *et seq.*, confers authority upon the President to set aside federal lands to be managed as national monuments. The Act provides:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

16 U.S.C. 431. The Antiquities Act contains no provision for judicial review.

2. In the years 2000 and 2001, President Clinton issued proclamations establishing the six national monuments challenged in this case: the Grand Canyon-Parashant National Monument, the Ironwood Forest National Monument, and the Sonoran Desert National Monument in Arizona; the Canyons of the Ancients National Monument in Colorado; the Cascade-Siskiyou National Monument in Oregon; and the Hanford Reach National Monument in Washington. Pet. App. 3-4. Each of the proclamations identified objects of historic or scientific interest to be protected. *Id.* at 56-97. Each proclamation specifically stated that the land set aside is "the smallest area compatible with the proper care and management of the objects to be protected." *Id.* at 62, 69, 75, 82, 88, 94.

3. Petitioners filed suit in federal district court, alleging that President Clinton's designation of each of the monuments was *ultra vires* because the Property Clause (U.S. Const. Art. IV, § 3, Cl. 2) gives Congress sole power to dispose of and make rules and regulations respecting federal property. See Pet. App. 51-54. President Clinton, in his official capacity as President, was the sole defendant named in petitioners' complaint. *Id.* at 35. The complaint asked that the challenged proclamations be declared null and void and that the lands encompassed within the designated areas be returned to the management regimes that were in place before the designation of the monuments. *Id.* at 54.

The district court dismissed the complaint for failure to state a claim. See Pet. App. 16-17. In its oral ruling, the court explained that petitioners' constitutional claims lacked merit because the President had acted pursuant to a valid statutory grant of authority that established "intelligible principles" to cabin the President's discretion. See *id.* at 20-21, 27. The court further observed that the proclamations on their face were consistent with the standards contained in the Antiquities Act. *Id.* at 27. Under those circumstances, the court found it inappropriate "to engage in fact-finding as to exactly how many acres would have been the smallest area compatible with the proper care and management of the objects to be protected, for example, or whether or not these were historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest." *Ibid.* The court also explained that "in looking at whether a complaint should be dismissed on failure to state a claim * * * one has to look at the face of the complaint." *Id.* at 30. "[H]aving looked at the amended complaint," the court concluded that petitioners "really ha[ve]n't made

factual claims that should require a trial and discovery. [They] did make constitutional claims." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-13.

The court of appeals observed that the only theory of liability set forth in petitioners' complaint was "that the six Proclamations at issue exceed the President's authority under the Property Clause and are therefore 'unconstitutional and *ultra vires*.'" Pet. App. 9. The court held that petitioners could not establish a Property Clause violation because "the President exercised his delegated powers under the Antiquities Act, and that statute includes intelligible principles to guide the President's actions." *Id.* at 9-10. The court also rejected petitioners' alternative contention, not included in their complaint but subsequently raised during briefing and argument in the district court, that only "rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts," are eligible for designation as "national monuments" under the Antiquities Act. *Id.* at 10. The court explained that petitioners' argument "fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." *Ibid.* (citing *Cameron* v. *United States*, 252 U.S. 450 (1920)).

Finally, the court found that "to the extent that [petitioners] seek[] *ultra vires* review under the Act, [their] complaint and statutory arguments present no more than legal conclusions." Pet. App. 10. The court explained:

> To warrant further review of the President's actions, [petitioners] would have to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act. Having

> failed to do this, [petitioners] present[] the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority. The inadequacy of [petitioners'] assertions thus precludes [them] from showing that the district court erred in declining to engage in a factual inquiry to ensure that the President has complied with the statutory standards.

Id. at 11 (citations omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The sole defendant named in petitioners' complaint was the President of the United States in his official capacity. See Pet. App. 35. This Court's decisions strongly indicate that courts lack authority to award declaratory or injunctive relief against the President. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 825-829 (1992) (Scalia, J., concurring in part and concurring in the judgment). In any event, the President is not an "agency" subject to suit under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, see *Franklin*, 505 U.S. at 800-801 (opinion of the Court); the Antiquities Act contains no judicial review provision; and petitioners identify no other provision of law that purports to authorize the filing of a suit against the President under the circumstances presented here. Thus, whatever the appropriate scope of review might be in a suit against an appropriate defendant (*e.g.*, a subordinate Executive Branch official charged with managing the public lands in question), the unavail-

ability of judicial process to compel or prohibit the President's performance of an official act provides an independent ground for dismissal of petitioners' suit and denial of certiorari.

2. Petitioners' complaint asserted a single claim with respect to each of the six monuments at issue: that the President acted *ultra vires* and unconstitutionally because the Property Clause vests in Congress the sole authority to make rules and regulations respecting federal property. See Pet. App. 51-54. As the court of appeals correctly explained, that claim fails because the President, in designating the national monuments at issue here, exercised power conferred by Congress in the Antiquities Act. *Id.* at 9-10. The Act authorizes the President to identify "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" located upon federal land, and it directs that the designated area "be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. 431. The Act thus "includes intelligible principles to guide the President's actions." Pet. App. 10; see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

3. Petitioners contended on appeal that the President's authority under the Antiquities Act is limited to the protection of man-made objects, and that the six monuments at issue here were invalidly designated because they were created at least in part to protect natural objects. See Pet. App. 10; Pet. C.A. Br. 31-41. The court of appeals correctly rejected that contention, observing that this Court has repeatedly "interpret[ed] the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." Pet. App. 10. In upholding President

Theodore Roosevelt's creation under the Antiquities Act of the 800,000 acre Grand Canyon National Monument in Arizona, this Court explained:

> The Act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

Cameron, 252 U.S. at 455-456; accord *Cappaert* v. *United States*, 426 U.S. 128, 141-142 (1976); *United States* v. *California*, 436 U.S. 32, 34 (1978).

4. Thus, the court of appeals considered and squarely rejected petitioners' contentions that (a) the presidential proclamations at issue here were barred by the Property Clause, and (b) the Antiquities Act authorizes protection only of man-made objects. The only claim that the court declined to adjudicate on the merits was petitioners' contention (see Pet. C.A. Br. 12-31) that the President had abused the discretion conferred upon him by the Antiquities Act when he determined that the designated national monuments satisfied the statutory criteria. The court of appeals held that it need not "decide the ultimate question of the availability or scope of review for exceeding statutory authority" under the Antiquities Act because petitioners had not adequately pleaded such a claim in their complaint. Pet. App. 11.

That holding is correct. As this Court has recognized, "an ultra vires claim rests on 'the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.'" *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101 n.11 (1984) (quoting *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949)). In alleging that President Clinton had "acted unconstitutionally and *ultra vires*" because the Property Clause vests Congress with power over federal lands, see Pet. App. 51-54, petitioners did not place the federal government on notice that they were disputing the President's judgment that the challenged monuments satisfied the relevant statutory criteria.

Even if petitioners had timely pleaded a claim that the President abused his discretion in applying the Antiquities Act standards to the designations at issue here, petitioners would not be entitled to judicial review of that contention. Even as a general matter, waivers of sovereign immunity must be express, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and there is no waiver of sovereign immunity for such a claim. But in addition, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," this Court "would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin*, 505 U.S. at 800-801; accord *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994) ("[W]here a claim concerns not a want of Presidential power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power.") (brackets and internal quotation marks omitted); *United States* v. *George S. Bush & Co.*,

310 U.S. 371, 380 (1940) (application by the President of a statutory standard to a particular set of facts "is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment").* Neither the Antiquities Act nor any other federal statute authorizes abuse-of-discretion review of the President's designation of national monuments under the Act. Petitioners' abuse-of-discretion claim therefore would not be justiciable even if it had been pleaded in a timely and adequate manner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2003

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* Petitioners' reliance (Pet. 14-16) on such cases as *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is therefore misplaced. Those cases do not involve abuse-of-discretion challenges to decisions entrusted by statute to the President. As *Franklin* and *Dalton* confirm, the presumption with respect to such claims is *against* judicial review, not in favor of it.

Supreme Court, U.S.
FILED
JUL 2 2003
OFFICE OF THE CLERK

No. 02-1590

In The Supreme Court of the United States

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*

and

THE WILDERNESS SOCIETY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Antiquities Act of 1906, 16 U.S.C. §§ 431-33, contain intelligible principles that render it a constitutional grant of authority to the President?

2. Does the Antiquities Act empower the President to create a National Monument in order to protect natural objects?

3. May a plaintiff raise a statutory challenge to the creation of National Monuments for the first time on appeal when the complaint alleged only that their creation was unconstitutional and *ultra vires*?

4. If a plaintiff may raise a statutory challenge to the creation of National Monuments for the first time on appeal when the complaint alleged only that their creation was unconstitutional and *ultra vires*, may that challenge be dismissed when the plaintiff fails to allege a single fact in support of its claim?

OBJECTIONS TO QUESTIONS PRESENTED BY PETITIONERS

1. The first issue presented by Petitioners is "[w]hether judicial review is available to enforce the limitations on presidential authority contained in the Antiquities Act." This issue is not before this Court because: (1) the court below held that judicial review was available and Petitioners do not dispute that fact; and (2) Petitioners' complaint does not raise any statutory claims under the Antiquities Act.

2. The second issue presented by Petitioners is "[w]hether the courts below abdicated their responsibility to determine whether statutory restrictions have been violated." This issue is not before this Court because Petitioners' complaint does not raise any statutory claims under the Antiquities Act.

3. LIST OF PARTIES

The following are parties to this proceeding:

1. Petitioner:

Mountain States Legal Foundation
The Blue Ribbon Coalition, Inc.

2. Respondents:

George W. Bush
The Wilderness Society
Natural Resources Defense Council
Soda Mountain Wilderness Council
National Wildlife Federation
Defenders of Wildlife
Sierra Club
National Trust for Historic Preservation
Society for American Archaeology

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Wilderness Society, Natural Resources Defense Council, Soda Mountain Wilderness Council, National Wildlife Federation, Defenders of Wildlife, Sierra Club National Trust for Historic Preservation, and Society for American Archaeology have no parent companies and issue no corporate stock.

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INTRODUCTION

This case concerns an effort by Petitioners Mountain States Legal Foundation *et al.* (collectively "MSLF") to abolish six National Monuments created by President Clinton in 2000 and 2001. MSLF's constitutional and *ultra vires* challenges to the creation of these National Monuments were dismissed from the bench by the district court. MSLF App. at 16-31.[1] The district court's decision was subsequently affirmed by a unanimous panel of the D.C. Circuit. *Id.* at 1-13. After failing to win *en banc* review of the panel's decision, MSLF responded with the instant petition. *Id.* at 32-33 (denying MSLF's petition for rehearing *en banc*).

MSLF's petition should be denied. First, The Antiquities Act is a constitutional delegation of Congress's Property Clause power because the statute provides "intelligible principle[s]" that guide the President's actions. Second, MSLF's claim that the President acted *ultra vires* because the Antiquities Act allegedly allows the President to create National Monuments to protect only man-made objects already has been rejected by this Court and others, which have uniformly recognized that the phrase "and other objects of historic or scientific interest" in the Antiquities Act leaves the President ample authority to create National Monuments to protect natural objects. In any case, the six Monuments at issue were created to protect both human and natural objects. Third, this Court need not consider whether the district court applied the appropriate standard of review for statutory claims under the Antiquities Act because MSLF's complaint presents no such claim. Because *ultra vires* and

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[1] The abbreviation "MSLF App." is used throughout to refer to the appendix to MSLF's Petition for Writ of Certiorari. "App." refers to the appendix to this brief in opposition. "MSLF Pet." refers to MSLF's Petition for Writ of Certiorari.

constitutional claims – which are alleged in MSLF's complaint – are distinct from statutory claims – which are not alleged – MSLF may not win a reversal on the grounds that the courts below should have applied a more exacting level of review to statutory claims. Fourth, even if MSLF had raised a statutory claim in its complaint – which it did not – that claim would have been properly dismissed because MSLF's complaint failed to provide a single factual ground for a statutory claim.

STATEMENT OF THE CASE

A. The Creation Of The National Monuments At Issue In This Case

The Antiquities Act provides in relevant part that:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments ....

16 U.S.C. § 431 (emphasis added). Over the last ninety-seven years, presidents have established more than 100 National Monuments pursuant to the Antiquities Act. These Monuments have encompassed some of the nation's most renowned and unique lands and cultural sites, including the Grand Canyon, Death Valley, Denali, and the Grand Tetons.

Like nearly every other president in the preceding century, President Clinton used his power under the Antiquities Act to create National Monuments. His creation of six particular National Monuments is challenged by MSLF in this case: (1) the Grand Canyon-Parashant National Monument in Arizona; (2) the Canyons of the Ancients

National Monument in Colorado; (3) the Cascade-Siskiyou National Monument in Oregon; (4) the Hanford Reach National Monument in Washington State; (5) the Ironwood Forest National Monument in Arizona; and (6) the Sonoran Desert National Monument in Arizona. President Clinton established these Monuments in order to protect an array of man-made and natural objects of historic and scientific interest. *See* MSLF App. at 56-97 (proclamations creating these National Monuments).

B. The Proceedings Below

The National Monuments that MSLF is trying to abolish through this action were created in January and June, 2000, and in January, 2001. MSLF App. at 56-97 (National Monument proclamations). On August 29, 2000, MSLF filed its initial complaint for declaratory and injunctive relief. On January 29, 2001, MSLF filed an amended complaint in which it added the Sonoran Desert National Monument to its list of challenged monuments. *See* MSLF App. at 53-54 (first amended complaint). MSLF's amended complaint also altered its causes of action slightly to allege that the creation of each of the National Monuments was "unconstitutional and *ultra vires*." *Id.* at 51-54.

The President moved to dismiss MSLF's amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant-intervenors The Wilderness Society *et al.*, a coalition of conservation, historic preservation, and archaeological organizations, also filed a Rule 12(b)(6) motion to dismiss. In the course of the briefing on the motions to dismiss, MSLF clarified that its constitutional claim alleged that the Antiquities Act is an impermissibly broad delegation of Congress's Property Clause power. The briefing also revealed that MSLF's *ultra vires* claim rested on its belief that the Antiquities Act empowers a President to create National Monuments only in order to protect man-made objects and that President Clinton acted beyond this

delegated power when he allegedly created the six National Monuments to protect natural objects. *See* App. (Plaintiffs' Opposition to Defendant's and Intervenors' Motions to Dismiss). In addition, MSLF stated explicitly and repeatedly in its briefing that it was not raising a statutory claim. *Id.* at 13 (insisting that "Plaintiffs did not raise a statutory claim ...."), 16 (declaring that "this case does not raise a statutory claim" and that "this case concerns not a mere abuse of presidential discretion but rather an absence of presidential authority ....").

On November 15, 2001, Judge Friedman granted the motions to dismiss from the bench. MSLF App. at 18-31. He held that: (1) the Antiquities Act is a valid delegation of Congress's Property Clause power to the President, *id.* at 22-23; (2) the President is entitled under the Antiquities Act to create National Monuments to protect natural objects, *id.* at 27, 28-29; (3) MSLF had not raised any statutory claims in its complaint, *id.* at 30; and (4) the Court should not look beyond the proclamations creating the Monuments because it is apparent from the proclamations that the President applied the standards set out in the Antiquities Act, *id.* at 24-29. The following day, the district court issued a written order granting the two motions to dismiss and dismissing the complaint for failing to state a claim. *Id.* at 16-17.

The district court's decision was affirmed unanimously by the D.C. Circuit on October 18, 2002. The panel held that MSLF's constitutional claim fails because "the President exercised his delegated powers under the Antiquities Act, and that statute contains intelligible principles to guide the President's action." MSLF App. at 9-10 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2000); *Dalton v. Specter*, 511 U.S. 462, 473-75 & n. 6 (1994)). The court disposed of MSLF's *ultra vires* argument that the Antiquities Act may be used to protect only "rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts," MSLF App. at 10, with similar dispatch. "That argument,"

the court declared, "fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." *Id.* The court also held that, to the extent MSLF's *ultra vires* argument was alleging that the President had exceeded the express limitations on presidential power set out in the Antiquities Act itself, this claim was properly dismissed because MSLF had failed to provide a single factual allegation to support such a claim. MSLF App. at 2, 10-11.

MSLF responded to the panel's decision by petitioning for rehearing *en banc*. That petition was denied on January 30, 2003. MSLF App. at 32-33.

REASONS FOR DENYING THE PETITION

I. THE PANEL CORRECTLY HELD THAT THE ANTIQUITIES ACT IS A CONSTITUTIONAL DELEGATION OF CONGRESS'S PROPERTY CLAUSE POWER.[2]

From the earliest days of the republic, Congress has delegated to the President the power to "withdraw" and

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[2] Although this constitutional argument formed the heart of MSLF's original claim in this case, it is unclear whether MSLF means to pursue it in this Court. Because MSLF's Questions Presented are less than clear on this point, The Wilderness Society *et al.* present a brief discussion of the issue. As this abbreviated presentation makes amply clear, there is no reason for this Court to take up MSLF's non-delegation argument. Indeed, it is worth noting that MSLF raised its non-delegation argument shortly after the D.C. Circuit's non-delegation decision in *Am. Trucking Ass'ns, Inc. v. Whitman*, 195 F.3d 4 (D.C. Cir. 1999), and that this argument largely fell by the wayside after this Court's unanimous reversal of that decision in *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

"reserve" public lands.[3] *See* WHEATLEY, *supra* note 3, at 54-62; GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 3.04 (2000) ("The congressional Property Clause power is not exclusive: the President, when acting pursuant to delegated congressional power, can dispose of federal property."). Among the many statutes in which Congress has delegated its Property Clause power is the Antiquities Act.

Courts have explicitly recognized the Antiquities Act as a legitimate delegation of Congress's Property Clause authority. When, for example, the plaintiff argued in *Cameron v. United States*, 252 U.S. 450 (1920), that the Grand Canyon National Monument designation "should be disregarded on the ground that there was no authority for its creation," this Court disagreed, holding that the Grand Canyon is clearly an object of historic or scientific interest for the purposes of the Antiquities Act. *Id.* at 455. *See also United States v. California*, 436 U.S. 32, 36 (1978) (whether an area was included within the Channel Islands National Monument was "a question only of Presidential intent, not of Presidential power"); *Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1978) (the Antiquities Act embodies "a specific delegation of Congressional authority").

The Antiquities Act easily satisfies any constitutional delegation concerns. A Congressional delegation passes constitutional muster if it provides an "intelligible principle to which the person or body authorized to [act] is directed to

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[3] A "withdrawal" removes land from the operation of any otherwise applicable general land laws, with the ultimate disposition of the land to be determined by Congress or the executive branch. A "reservation" both "withdraws" the land and immediately dedicates the land to some special use. *See* C. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC LANDS A-1 to A-2 (1969). The two terms are often used interchangeably in today's discussions of public lands laws.

conform." *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). In the Antiquities Act, Congress provided "intelligible principle[s]" to guide the President's action by requiring that the Act be used to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," and by requiring that a Monument be "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

The principles laid out in the Antiquities Act are at least as "intelligible" as many that the Supreme Court has approved. In *Whitman*, for example, the Supreme Court found the necessary "intelligible principle" in Congress's command that EPA set air quality standards "'requisite' . . . to protect the public health with an adequate margin of safety." *Whitman*, 531 U.S. at 475-76. *See also Touby v. United States*, 500 U.S. 160, 163, 165 (1991) (intelligible principle found in statute empowering Attorney General to designate a drug as a controlled substance if "necessary to avoid an imminent hazard to the public"); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216, 226 (1943) (finding "intelligible principle" in statutes authorizing regulation in the "public interest"). President Clinton's exercise of his power to create and reserve National Monuments, therefore, was plainly constitutional and there is no reason to review that decision further in this Court.

II. MSLF's ULTRA VIRES ARGUMENT WAS PROPERLY DISMISSED BECAUSE MSLF CAN PROVE NO SET OF FACTS THAT COULD DEMONSTRATE THAT IT IS IMPERMISSIBLE FOR A PRESIDENT TO USE THE ANTIQUITIES ACT TO PROTECT NATURAL OBJECTS OF HISTORIC AND SCIENTIFIC INTEREST.

MSLF's *ultra vires* argument asserts that President Clinton's creation of the challenged National Monuments was beyond his authority because the Antiquities Act allegedly only empowers a President to create a national monument in order to protect man-made objects. *See* MSLF App. at 10. This artifacts-only argument was rightly rejected by the D.C. Circuit and there is no reason for this Court to address the question further.

First, MSLF's artifacts-only interpretation of the Antiquities Act has been squarely rejected by the Supreme Court and others. In the very first case involving the Antiquities Act, a miner claimed that the Court should ignore the fact that the area in dispute was within the Grand Canyon National Monument because "there was no authority for its creation." *Cameron*, 252 U.S. at 455. This Court disagreed, explaining that:

> The act under which the president proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his [*i.e.*, President Roosevelt's] proclamation "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural

> wonders, and annually draws to its borders thousands of visitors.

Id. at 455-56.

This issue also arose in *Cappaert v. United States*, 426 U.S. 128 (1976), when plaintiffs argued that the addition of the Devil's Hole to the Death Valley National Monument was *ultra vires*. The President, they claimed, may use the Antiquities Act "only to protect archaeological resources." *Id.* at 141-42. This Court disagreed once again:

> [T]he language of the Act which authorizes the President to proclaim as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government" is not so limited. The pool in Devil's Hole and its rare inhabitants are "objects of historic or scientific interest."

Id. at 142. *See also Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945) (upholding the creation of the Jackson Hole National Monument because the area contained "objects of historic or scientific interest" such as glaciers, peculiar mineral deposits, and indigenous plants and wildlife). There are many Antiquities Act issues that have not been addressed by the courts. As the foregoing demonstrates, whether the Act can be used to protect natural objects is not one of them.

Second, the text of the Antiquities Act leaves ample room for the President to create National Monuments to protect natural objects. The Act provides in relevant part that:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific

> interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments ....

16 U.S.C. § 431 (emphasis added). While Congress's reference to "historic and prehistoric structures" presumes that those objects are man-made, the catch-all phrase "other objects of historic or scientific interest" contains no such presumption.

Third, Congress's inaction in the face of visible executive practice interpreting the Antiquities Act "constitutes persuasive evidence that that interpretation is the one intended by Congress." *Zemel v. Rusk*, 381 U.S. 1, 11 (1965). As the D.C. Circuit has said, "the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting Congressional reversal, it is entitled to great respect." *AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (internal quotation omitted). Such respect is particularly appropriate when Congress has considered legislation concerning the statute without changing the provision in question. *See, e.g., id.* at 795-96 (concluding that where Congress was aware of the President's contested interpretation of a statute and nevertheless renewed the statute without significant modification, "[i]n this context, a court could only in the most extreme case find that the Executive has violated the statute").

Presidents have created more than 100 National Monuments since 1906, many of which were created to protect natural objects. *See* 16 U.S.C.A. § 431 (list of national monuments). Although some of the Monuments encompassed millions of acres and were the subject of significant controversy, Congress has never indicated that the creation of the Monuments was beyond the President's Antiquities Act power. That Congress has had the opportunity to do so is undeniable. For example, when

Congress passed the Federal Land Policy and Management Act of 1976, it repealed the President's withdrawal authority under 29 existing statutes. *See* Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976). Congress, though, intentionally left the President's Antiquities Act withdrawal authority intact. *See* H.R. Rep. No. 94-1163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6203 ("The bill would repeal . . . all identified withdrawal authority granted to the President or the Secretary of Interior. The exceptions, which are not repealed, are contained in the Antiquities Act" and three other statutes.).[4]

National Monuments have been created to protect natural objects for nearly a century. Those Monuments have affected millions of acres, spawned Supreme Court decisions, and been the subject of Congressional scrutiny and complaint. Nonetheless, Congress has never contested the President's ability to create National Monuments for that purpose. This silence marks a paradigmatic example of Congressional acquiescence.

Fourth, in any event, President Clinton created the six National Monuments in order to protect man-made as well as natural objects. For example, the President's proclamation creating the Canyon of the Ancients National Monument in

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[4] Further evidence of Congressional acquiescence can be seen in past Antiquities Act legislation, none of which contested the President's authority to use the Act to protect natural objects. This is particularly telling in the case of Congress's response to President Roosevelt's creation of the Jackson Hole National Monument. Although that Monument was the subject of a court challenge that confirmed the President's ability to create National Monuments to protect natural objects, *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945), Congress did not respond by restricting or contesting that ability. Instead, it only limited the President's authority to enlarge or create National Monuments in Wyoming. *See* 16 U.S.C. § 431a.

Colorado announces in its very first sentence that it is motivated by the fact that the area "[c]ontain[s] the highest known density of archaeological sites in the Nation, ... [and that] the Monument offers an unparalleled opportunity to observe, study, and experience how cultures lived and adapted over time in the American Southwest." MSLF App. at 65. *See also* App. at 81 (describing archaeological resources within Hanford Reach Monument), 58-60 (archaeological and historic resources within the Grand Canyon-Parashant Monument), 86-87 (same within Ironwood Forest Monument), 91-93 (archaeological and historic sites within Sonoran Desert Monument), 73-74 (portions of historic Oregon/California Trail in Cascade-Siskiyou Monument). Therefore, even if the Antiquities Act could not be used to establish National Monuments to protect natural objects, as MSLF asserts, there is no reason for this Court to take up that issue here because the six National Monuments at issue were established to protect man made objects as well.

III. THE LEVEL OF JUDICIAL REVIEW FOR STATUTORY CLAIMS UNDER THE ANTIQUITIES ACT IS NOT A QUESTION PROPERLY BEFORE THIS COURT.

MSLF spends the bulk of its petition arguing that the decision below must be reversed and that MSLF must be given the opportunity on remand to carry out discovery in order to determine whether "the president has acted in full compliance with the legislative commands contained in the" Antiquities Act. MSLF Pet. at 16. *See also id.* at 10-11 (discovery necessary in order to explore MSLF's claims), 14 (court must determine whether there has been full "compliance with statutory limitations on authority"). The fundamental flaw in MSLF's position is that, in fact, MSLF's complaint did not challenge the creation of the National Monuments on statutory grounds. *See* MSLF App. at 51-54 (alleging only that the creation of each Monument

was unconstitutional and *ultra vires*). Indeed, there is not a hint in MSLF's complaint that it was challenging President Clinton's failure to abide by any particular statutory limitation in the Antiquities Act.

MSLF argues strenuously that its *ultra vires* claim should not have been dismissed because the parties and the district court all understood MSLF was making an *ultra vires* argument. MSLF Pet. at 7-9. MSLF is certainly quite right that the parties and district court understood that MSLF was making an *ultra vires* claim; this claim is plain from the face of the complaint. Where MSLF is absolutely mistaken, however, is in its assumption that presidential action that violates a statutory provision is, *ipso facto*, *ultra vires* the President's delegated authority. What MSLF fails to appreciate is that statutory, *ultra vires*, and constitutional claims are distinct, non-fungible categories. Judge Friedman appreciated this distinction when he pointed out in his ruling from the bench that:

> In looking at whether a complaint should be dismissed on failure to state a claim . . . one has to look at the face of the complaint, and despite some of the arguments that [MSLF's counsel] Miss Koehler made this afternoon, I think it is accurate having looked at the amended complaint . . . to say that the plaintiff really hasn't made factual claims that should require a trial and discovery. She made constitutional claims.

MSLF App. at 30 (emphasis added).

The distinction between statutory and *ultra vires* claims is firmly rooted in Supreme Court precedent. In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the leading case on this topic, a corporation sued the War Assets Administration for allegedly failing to comply with a coal contract. *Id.* at 684. In response to the government's sovereign immunity defense, the corporation, like MSLF in

this case, argued that illegal actions are necessarily *ultra vires* and not the actions of the sovereign because the sovereign is never authorized to act illegally. *Id.* at 692-93.

The Court rejected this argument and distinguished *ultra vires* actions for which there is no delegated power, from illegal actions resulting from the improper exercise of delegated power. Because the Administrator in *Larson* was empowered to enter into contracts, this Court said, a challenge to his adherence to a contract could not be an *ultra vires* claim. "There was, it is true, an allegation that the Administrator was acting 'illegally,' and that the refusal to deliver was 'unauthorized.' But these allegations were not based and did not purport to be based upon any lack of delegated power. Nor could they be, since the Administrator was empowered by the sovereign to administer a general sales program . . . ." *Id.* at 692. *See also id.* at 693 (even if the Corporation had established that the Administrator had breached the contract, this would not make out an *ultra vires* claim because it would not "establish that the officer, in committing that wrong, is not exercising the powers delegated to him . . . ."). As the Court put it succinctly, an action is *ultra vires* when there is a "lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Id.* at 690.

Courts since *Larson* have continued to distinguish between *ultra vires* and illegal actions. For example, in *Pennhurst State School Dist. & Hospital v. Halderman*, 465 U.S. 89 (1984), this Court held that an officer "may be said to act *ultra vires* only when he acts 'without any authority whatever.'" *Id.* at 102 (quoting *Florida Dep't of State v. Treasure Salvors*, 458 U.S. 670, 697 (1982)).[5]

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[5] This Court has also made clear that statutory claims do not necessarily raise constitutional issues. *See Dalton v. Specter*, 511 U.S. 462, 472 (1994) ("every action by the President, or by

When President Clinton established the six Monuments, he was, like the Administrator in *Larson*, acting pursuant to a congressionally delegated power. *See supra* at 6-7; MSLF App. at 62, 69, 74, 82, 87, 94 (proclamations for each Monuments declaring that they were being created pursuant to the Antiquities Act). Therefore, any claim that he violated the statutory limitations in the Antiquities Act is a statutory rather than an *ultra vires* claim.[6] Because the statutory claims that MSLF refers to in its petition are not within the bounds of the *ultra vires* and constitutional claims presented in its complaint, MSLF's arguments regarding the pleading standard for statutory claims or the need for a probing factual review to assess any statutory violations by the President are not germane to this case and so cannot support a petition for writ of certiorari.

IV. EVEN IF MSLF'S *ULTRA VIRES* CLAIM IS REINTERPRETED ON APPEAL AS A STATUTORY CLAIM, SUPREME COURT REVIEW IS UNWARRANTED BECAUSE A CLAIM IS PROPERLY DISMISSED WHEN A PLAINTIFF FAILS TO STATE ANY FACTUAL GROUNDS FOR A CLAIM.

Even if MSLF's *ultra vires* claim is understood somehow to raise a statutory challenge, further review would be

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another elected official, in excess of his statutory authority is not *ipso facto* in violation of the Constitution"), 474 n.6 ("in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no 'constitutional question whatever' is raised . . . . Rather, 'the cases concern only issues of statutory interpretation.'" (Citation omitted.)

[6] MSLF's argument that Congress meant the Antiquities Act to be used solely to protect human artifacts presents an *ultra vires* claim because it goes to the nature rather than the exercise of the President's delegated powers. *See* text *supra* at 8-12 (explaining why this *ultra vires* claim must fail).

inappropriate because the appellate court correctly held that a claim should be dismissed when the plaintiff fails to provide any factual grounds for the claim in its complaint. MSLF's argument that the D.C. Circuit applied a heightened pleading standard to MSLF's complaint misreads the panel's decision and misunderstands the notice pleading requirement and so cannot possibly justify review by this Court.

Contrary to MSLF's characterization of the D.C. Circuit's decision, the court did not require MSLF to "allege all the facts necessary to prove its claim." MSLF Pet. at 13 (emphasis added). Rather, the court refused to consider any statutorily based claim raised by MSLF because MSLF had "failed to present any factual allegation sufficient to warrant review ...." MSLF App. at 2 (emphasis added). *See also id.* at 10 ("At no point has Mountain States presented factual allegation that would occasion further review of the President's actions."). The question then, is not whether a plaintiff must allege every single fact in support of a claim, but instead whether a plaintiff must include any factual allegation. By holding that a plaintiff must provide some factual allegation in support of its claim, the D.C. Circuit acted squarely within the bounds of this and every other court's pleading jurisprudence.

The Antiquities Act contains several restrictions on the president's use of the Act; the president may use the Act only to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," and must ensure that any Monument be "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. In order to make out a claim that the president violated any of these restrictions, MSLF would have had to allege at least some facts indicating that the National Monuments were created to protect objects that lack "scientific or historic interest," or that the Monuments are too large to protect the objects to be protected. MSLF did neither of these. *See* MSLF App. at

35-55 (complaint). There is not a single mention of these restrictions in MSLF's complaint. Nor, for that matter, is there even any mention of the Antiquities Act itself.[7]

This Court and others have held that, even under the liberal notice pleading rules, a plaintiff must provide some factual allegations in support of its legal claims. For example, in *Conley v. Gibson*, 355 U.S. 41 (1957), the case upon which MSLF principally relies, this Court made clear that, in addition to describing the legal claim being made, a plaintiff must set forth "the grounds upon which it rests." *Id.* at 47. The failure to include such factual allegations, this Court has ruled, leaves a claim subject to dismissal. In *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), for example, this Court held that a union's complaint should be dismissed because it failed to allege facts that that would demonstrate that the employer association had committed the antitrust violations claimed by the union. Although the Court acknowledged that it "must assume that the Union can prove the facts alleged in its complaint," dismissal was appropriate because it is not "proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Id.* at 526.

Numerous courts of appeal have followed suit. *See, e.g.*, *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 222 (4th Cir. 1994) (complaint must provide "sufficient

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[7] MSLF's briefing below demonstrated below that this was no accident. MSLF stated repeatedly in the district court that it was not raising a statutory challenge to President Clinton's creation of the National Monuments. *See* App. at 13 (insisting that "Plaintiffs did not raise a statutory claim ...."), 16 (declaring that "this case does not raise a statutory claim" and that "this case concerns not a mere abuse of presidential discretion but rather an absence of presidential authority ....").

facts so that each element of the alleged antitrust violation can be identified"); *Perkins v. Silverstein*, 939 F.2d 463, 467 (7th Cir. 1991) (affirming the dismissal of a claim under Rule 12(b)(6) because the plaintiffs had failed "to identify the grounds upon which their claims are based" and, citing *Conley*, holding that "[t]hey must do so, even under the liberal notice pleading of Rule 8(a)"); *Municipal Util. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1501 (11th Cir. 1991) (quotation and citation omitted) ("[c]onclusory allegations will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief"); *Jones v. Community Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (citations omitted) (affirming the Rule 12(b)(6) dismissal of a complaint that contained only "conclusionary allegations, unsupported by facts"); *Kadar Corp. v. Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) (citations and quotations omitted) (affirming the dismissal of a claim for which plaintiff had failed to provide sufficient factual support, explaining that a plaintiff must provide factual allegations that "outline the elements" of its claim and that "[m]ore detail is required than a plaintiff's bald claim that he has a valid claim of some type").[8]

Courts have likewise rejected MSLF's suggestion that the notice pleading rules allow a plaintiff to file a complaint

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[8] Federal practice treatises are in accord. *See* 2 MOORE'S FEDERAL PRACTICE, § 8.04[2] (Matthew Bender 3d ed.) ("Sufficient factual allegations must be pleaded along with conclusions of law to give fair notice to the opposing party."); 1 RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE 353 (5th ed. 1998) (under Rule 8(a), "The statement of a claim" must include "factual descriptions of events which are then shown to fit the language of the legal rule invoked"); 1 MOTIONS IN FEDERAL COURT 323 (3d ed. 1996) ("To survive a motion under FRCP 12(b)(6), a complaint" must, among other things "pinpoint[] the time, place, and circumstances" of the event that gave rise to the claim).

that is devoid of facts and then use discovery to search for the facts to support its claims. MSLF Pet. at 10-13. In *Cohen v. Illinois Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975), for example, a plaintiff alleged that the executives of a private university had acted under color of state law within the meaning of 42 U.S.C. § 1983 when they allegedly discriminated against a female faculty member. The court found that the facts set forth in the faculty member's complaint did "not support the conclusion that defendants acted under color of state law in their discrimination" against her. *Id.* at 827. Like MSLF in this case, the plaintiff in *Cohen* argued that "since she has alleged the necessary ultimate conclusion in the language of the statute, the complaint should not be dismissed before she has completed discovery which may reveal" the necessary facts to support her claim. *Id.* The 7th Circuit soundly rejected such a fishing expedition. "We agree," the court wrote, "that plaintiff is entitled to the fullest opportunity to adduce evidence in support of her claim. But she is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for a claim which she has not made." As another court noted when it rejected a similar discovery request:

> Before filing the complaint, counsel had the obligation to determine that the complaint was "well grounded in fact." Fed.R.Civ.P. 11. Consequently, it was not asking too much to require plaintiff to disclose some relevant facts and basis for them before the requested discovery would be allowed.

MacKnight v. Leonard Morse Hosp., 828 F.2d 48, 52 (1st Cir. 1987) (quoting statement in 4 Moore's Federal Practice § 26.56[1] at 26-95 n.3 that "discovery cannot be used as a vehicle for discovering a right of action").

None of the cases cited by MSLF in its petition support MSLF's view that notice pleading dispensed with the need to

provide any factual support for a claim. MSLF relies in large part upon *Conley v. Gibson*, 355 U.S. 41 (1957). MSLF Pet. at 7, 11, 13. As noted above, however, that case states explicitly that in addition to describing the legal claim being made, a complaint must set forth "the grounds upon which it rests." *Id.* at 47.

MSLF's reliance upon *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), is similarly unjustified. This Court held in that case that a complaint in an employment discrimination case need not allege facts constituting a prima facie case of discrimination. *Id.* Such a requirement, this Court explained, would conflict with the notice pleading requirement of Rule 8(a). *Id.* at 512. Whether or not a complaint must make out a prima facie case is not an issue in the instant case, however, because the court below imposed no such stringent requirement. Rather, the D.C. Circuit merely held that a complaint will fail if it contains no factual allegations in support of a claim. MSLF App. at 2, 10-11. Furthermore, rather than supporting MSLF's fact-free interpretation of Rule 8(a), *Swierkiewicz* undermines it by stating repeatedly that a complaint must set out the factual grounds upon which a plaintiff rests its claims. *Swierkiewicz*, 534 U.S. at 512, 514.[9]

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[9] The remaining cases cited by MSLF are similarly unsupportive of MSLF's cause. *See Leatherman v. Tarrant Cty. Narcotics Intelligence Coord. Unit*, 507 U.S. 163 (1993) (cited at MSLF Pet. at 13) (rejecting a "heightened pleading standard" because it conflicted with the Rule 8(a), which nonetheless requires a plaintiff to set out the grounds upon which its legal claim rests); *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978) (cited at MSLF Pet. at 10, 11) (discovery dispute in class action, which dispute had nothing whatsoever to do with the notice pleading requirements of Rule 8(a)); *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (cited at MSLF Pet. at 12) (factual allegations in plaintiff's complaint were sufficient to evade a Rule 12(b)(1) dismissal on Eleventh Amendment immunity grounds).

Finally, the fact that MSLF failed to include a single factual allegation in its complaint to support a claim that President Clinton's creation of the six National Monuments violated any statutory restriction in the Antiquities Act was not some mere oversight on MSLF's part. When MSLF filed its amended complaint, it was not trying to invalidate the National Monuments on the grounds that they were too large or that the objects within the Monuments were unworthy of protection. MSLF was after much larger game in this case. As their briefing below made clear, MSLF was trying to undermine the very foundation of the Antiquities Act by arguing that the Act itself was an unconstitutional delegation of Congress's Property Clause power. Failing that, MSLF was trying to sharply limit the use of the Antiquities Act by establishing that the Act could be used only to protect man-made objects. Both of these claims present purely legal issues that were perfectly suited for dismissal. There is no reason for this Court to consider their dismissal further.

CONCLUSION

MSLF presents no legitimate reason for this Court to review the D.C. Circuit's decision in this case. The Petition for a Writ of Certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOUNTAIN STATES LEGAL FOUNDATION, On Behalf of Its Members, and THE BLUE RIBBON COALITION, On Behalf of Its Members, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, In His Official Capacity as President of the United States, Defendants, and THE WILDERNESS SOCIETY, *et al.*, Defendant-Intervenors	Civ.No.:1:00CV02072 PLF **PLAINTIFFS' OPPOSITION TO DEFENDANT'S AND INTERVENORS' MOTIONS TO DISMISS**

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INTRODUCTION

On January 26, 2001, Mountain States Legal Foundation ("MSLF") and the Blue Ribbon Coalition ("BRC") (collectively, "MSLF"), filed Plaintiffs' First Amended Complaint on behalf of their members challenging, as violations of the Property Clause, Defendant's creation of six national monuments by proclamation. MSLF challenges the designation of six national monuments: the Grand Canyon-Parashant in northwestern Arizona, the Canyons of the Ancients in southwestern Colorado, the Cascade-Siskiyou in southwestern Oregon, the Hanford Reach in south central Washington, the Ironwood Forest in south central Arizona, and the Sonoran Desert in southern Arizona.

On March 26, 2001, Defendant moved to dismiss MSLF's first amended complaint, alleging that Defendant acted pursuant to authority provided by the Antiquities Act of 1906, 16 U.S.C. § 431, and that MSLF's complaint fails to satisfy standing requirements with regard to the Sonoran Desert National Monument. ON the same day, Intervenors filed a separate motion to dismiss. However, for the reasons set forth below, MSLF's first amended complaint may not be dismissed.

I. MSLF HAS DEMONSTRATED STANDING FOR THE MOTION TO DISMISS STAGE, TO CHALLENGE THE SONORAN DESERT NATIONAL MONUMENT.

The Supreme Court has set forth the requirements to prove Article III standing:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between

> the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quotations omitted). The burden on a plaintiff at the pleading stage is to "allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin,* 422 U.S. 490, 518 (1975).

A. MSLF Has Alleged Injury In Fact And Causation Sufficient For The Motion To Dismiss Stage.

Because MSLF' complaint contains allegations of concrete and particularized injury and because these allegations must be taken as true at this stage, MSLF's complaint satisfies the injury in fact requirement of standing for purposes of defeating a motion to dismiss.[10] At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. MSLF's complaint contains the requisite "general factual allegations of injury resulting from the defendant's conduct."

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[10] It is noted that Defendant does not challenge the organization standing of MSLF and BRC if organization members can meet the standing requirements. Nor does Defendant challenge the standing of MSLF and BRC members to challenge the other five monuments designated by Defendant.

MSLF's complaint alleges that its members have in the past used, and have "concrete plans" for the future to use, each of the six areas of federal lands described in the complaint—including the Sonoran Desert National Monument—for many purposes, purposes that are now barred by Defendant's conduct, including, but not limited to:

> Prospecting for minerals, exploring for and mining for ore bodies, exploring for and drilling for oil and gas deposits, hunting, fishing, camping or otherwise recreating, grazing livestock, harvesting timber, obtaining access to repair, upgrade or replace power transmission lines and facilities, obtaining access to private property or state-owned property, maintaining equipment, and for other lawful uses.

First Amended Complaint ¶ 5. MSLF's complaint also alleges that members of BRC have used the federal lands described in the complaint—including those encompassed within the Sonoran Desert National Monument—and plan to continue to access those federal lands for recreational purposes, recreational purposes that are now prohibits by Defendant's conduct. Complaint ¶ 26.

Furthermore, the complaint alleges that Defendant's conduct in issuing the Proclamation creating the Sonoran Desert National Monument has an immediate *de facto* effect upon and interferes with these myriad activities and uses of those federal lands. Complaint ¶¶ 42, 75-80.

Therefore, MSLF's complaint sufficiently alleges previous uses of the Sonoran Desert Monument area by members of MSLF and BRC and present and imminent injury to those uses directly caused by Defendant's conduct in designating those lands as a national monument.

Although MSLF will be required, at a later stage in this case, to set forth specific evident of Plaintiffs' injury, allegations of injury suffice at the motion to dismiss stage.

Lujan, 504 U.S. at 561. To require MSLF to set forth in its complaint facts specifically describing individual members' uses of the lands and the impacts on such uses caused by Defendant's monument designations eviscerates the notice pleading standard provided by Rule 8 of the Federal Rules of Civil Procedure and creates a direct conflict with the holding of the Supreme Court in *Lujan*.

B. MSLF Can Demonstrate The Existence Of Those Specific Facts Necessary To Support The Claim.

Although not necessary at this stage of the proceedings, MSLF has demonstrated the existence of the specific facts necessary to support the claim of injury, as required by *Lujan*, at the summary judgment state.[11] *Lujan*, 504 U.S. at 561. MSLF had attached declarations of SLF and BRC members detailing immediate and continuing injuries occurring in the Sonoran Desert Monument area to recreational and propriety interests,[12] McKinley Declaration (Decl.), Exhibit (Exh.) 1; and grazing, ranching and property maintenance interests, Utz Decl., Exh. 2.[13]

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[11] Contrary to Defendant's assertion, *see* Defs. Statmt. Of Pts. At 11, it is at the summary judgment stage, not the motion to dismiss state, that plaintiffs must describe specific "concrete plans." *Lujan*, 504 U.S. at 562, 564. Rather, on a motion to dismiss, the more general allegation of "concrete plans" is sufficient. *Id.* At 561.

[12] The injury arising from the "concrete plans" to use the federal lands and the present inability to fulfill those plans is an immediate injury as well as a future injury. *See* Defs Statmt. Of Pts at 11.

[13] The mere fact that the Proclamations purport not to affect valid existing rights does not prevent members of MSLF or BRC from being injured regarding a variety of activities and uses of the federal lands.

Because the allegations of injury and causation in the complaint and all supporting affidavits must be taken as true at the motion to dismiss stage, *O'Donnell v. Barry,* 148 F.3d 1126, 1130 (D.C. Cir. 1998), MSLF had sufficiently demonstrated injury in fact and causation beyond what is necessary for the purposes of surviving a motion to dismiss on standing with regard to the Sonoran Desert Monument.

II. THIS COURT HAS JURISDICTION TO REVIEW WHETHER THE PRESIDENT ACTED WITHIN THE SCOPE OF CONSTITUTIONAL AUTHORITY DELEGATED BY CONGRESS IN THE ANTIQUITIES ACT.

Defendant argues that this Court has no jurisdiction to review Defendant's designation of the challenged national monuments. Defs. Stmt. Of Pts. At 18. Defendant proposes to limit the jurisdiction of this Court to consideration of whether the Antiquities Act represents a permissible delegation of congressional authority to the President. Defs. Stmt. Of Pts. At 19. According to Defendant, this Court may not review Defendant's actions to ensure that Defendant has complied with the limits that Congress placed on the delegation of its constitutional authority "to make all needful rules and regulations" regarding federal lands. Defs. Stmt of Pts. At 19, 21-25.

Contrary to Defendant's arguments, it is the proper function and duty of this Court to review the actions of the Executive to ensure its compliance with the constitutional limits imposed upon it. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 582 (1952)("The President's power...must stem either from an act of Congress or from the Constitution itself."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949).

In *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992), the Supreme Court expressly recognized that "the President's actions may still be reviewed for constitutionality."[14] Moreover, the Supreme Court recognized the continuing applicability of this principle in *Dalton v. Specter*, 511 U.S. 462, 473-474 (1994).

Judicial review in this case is necessary in order to determine whether Defendant acted in violation of the Property Clause by reserving federal lands as national monuments contrary to the authority delegated to him by Congress in the Antiquities Act. Because such a determination necessarily presents a constitutional question, it constitutes a proper exercise of the jurisdiction of this Court.

A. This Court Has Jurisdiction To Review The President's Actions To Ensure That The Will of Congress Has Been Obeyed In The Designation Of National Monuments Pursuant To The Antiquities Act.

1. The purpose of requiring that Congress provide intelligible principles to guide the execution of delegated authority is to permit courts to determine whether the will of Congress has been obeyed.

The Supreme Court explained in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212,218 (1989), that the purpose of requiring that Congress provide "intelligible principles" to guide the exercise of delegated authority is to permit a court to "ascertain whether the will of congress has been obeyed."

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[14] The Supreme Court held in *Franklin* that the President's actions are not reviewable for abuse of discretion under the Administrative Procedure Act (APA). Plaintiffs have not pleaded the APA nor do Plaintiffs seek judicial review of Defendant's action under the APA. *See* First Amended Complaint.

See also, Touby v. United States, 500 U.S. 160, 168 (1991) (quoting *Skinner*); *American Power & Light Co. v. Securities & Exch. Comm'n,* 329 U.S. 90, 105 (1946) ("Private rights are protected by access to the courts to test the application of the [general congressional] policy in the light of these legislative declarations."); *Yakus v. United States,* 321 U.S. 414, 425 (1944) (delegation must "sufficiently mark[] the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will"). Whether the discretion of the delegate is "confined within a narrow or broad range," "the only concern of courts is to ascertain whether the will of Congress has been obeyed." *Yakus,*321 U.S. at 425.[15]

In *Panama Refining Co. v Ryan*, 293 U.S. 388, 432 (1935), the Supreme Court recognized the "wholesome and necessary principle" that the official acting pursuant to a congressional delegation of legislative authority must "show a substantial compliance" with the procedures and rules prescribed by Congress within the delegation in order to "give validity" to the exercise of authority pursuant to that delegation. Thus, the issuance of an order pursuant to a delegation must rest upon the required finding of facts or condition; if such a finding is lacking, "the order is ineffective." *Id.* Furthermore:

> We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the *constitutional restriction* applicable to such a delegation.

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[15] In fact, Justice Marshall restated the holding of the majority in *Touby*: "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby*, 500 U.S. at 170 (Marshall and Blackmun, JJ., concurring).

Id. at 433 (emphasis added)

Therefore, the determination of whether the President acted within the bounds provided by Congress the Antiquities Act is the epitome of a question of "constitutional restriction, which is properly within the jurisdiction of this Court *Youngstown Sheet & Tube,* 343 U.S. at 585, 587-588.

2. *Dalton v. Specter* is inapposite to this case.

Defendant cites *Dalton* in support of its argument that this Court has not jurisdiction to review whether Defendant acted within the scope of the congressional authority delegated to him by the Antiquities Act. Defs. Stmt. Of Pts. At 21. But *Dalton* is inapposite to this case for two reasons.[16]

First, *Dalton* involved a purely statutory and not a constitutional claim. *Dalton*, 511 U.S. at 474. The plaintiffs in *Dalton* pleaded no constitutional claim against the President. *Dalton,* 511 U.S. at 478 (concurring opinion). Because Plaintiffs in this case have plead a constitutional claim, *Dalton* does not apply.

Dalton stands for the proposition that judicial review of the President's actions based on a statutory claim is not available under the general constitutional notion of separation of powers; instead that review must be based on a separate, specific constitutional claim. *Dalton,* 511 U.S. at 473-474. In *Dalton*, the plaintiffs brought their cause of action under the APA, alleging that the President exceeded his authority under the Defense Base Closure and

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[16] Moreover, Defendants rely solely on *dicta* in the *Dalton* decision because the President was not a defendant in that case. *Dalton*, 511 U.S. at 467; 511 U.S. at 478 (Souter, Blackmun, Stevens, and Ginsbug, JJ., concurring).

Realignment Act of 1990 by accepting procedurally flawed base closure recommendations. *Id.* at 469, 474. Because the Supreme Court's decision in *Franklin* clearly precluded review of presidential action under the APA, the Court of Appeals sought to determine whether review was otherwise available. *Dalton*, 511 U.S. at 471. The Court of Appeals determined that constitutional review was available: "there is a constitutional aspect to the exercise of judicial review in this case—an aspect grounded in the separation of powers doctrine." *Id.* However, the Supreme Court reversed, rejecting the Court of Appeal's reasoning that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation of powers doctrine. *Id.* at 473-474 ("the claim raised here is a statutory one").

Dalton is the inapposite to this case because Plaintiffs did not raise a statutory claim, but instead raised a constitutional claim based on the Property Clause. *See* First Amended Complaint, ¶¶ 81-104. It is Defendant and Intervenors who raise the Antiquities Act as a basis for Defendant's actions. Defs. Stmt. Of Pts. At 1; Interv. Memo. at 1. Plaintiffs assert in response that the Antiquities Act does not provide a constitutional basis for Defendant's actions because Defendant, in designating the challenged monuments, exceeded the scope of the authority delegated to him by the Antiquities Act. Defendant's actions are therefore unconstitutional because they "stem [n]either from an act of Congress [n]ot from the Constitution itself." *Youngstown Sheet & Tube*, 343 U.S. at 585. Because the authority to manage federal lands is specifically granted to Congress via the Property Clause, Defendant's unauthorized actions in reserving more than two million acres of federal land violate the Property Clause.

Therefore, because Plaintiffs' constitutional claims are based not on a statutory claim or on a general "constitutional aspect...grounded in the separation of powers doctrine," as in *Dalton*, but rather are based specifically and solely on the

Property Clause, Plaintiffs' constitutional claims are judicially reviewable. *See Dalton*, 511 U.S. at 474 (recognizing "[t]he distinction between claims that an official exceeded his statutory authority, on the other hand, and claims that he acted in violation of the Constitution, on the other.").

Second, *Dalton* does not abrogate the authority of courts, in response to an alleged constitutional violation, to conduct judicial review of discretionary presidential action. Upon determining that the "exception identified in *Franklin* for review of constitutional claims" was inapplicable in *Dalton*, the Supreme Court examined whether the plaintiffs' statutory claims were otherwise reviewable outside the APA. *Dalton*, 511 U.S. at 474. The Court concluded that statutory review of the President's action, outside the APA and absent a constitutional claim, was not available "when the statute in questions commits the decision to the sole discretion of the President." *Id.* Because the plaintiffs' claim in *Dalton* was "not a constitutional claim, but a statutory one," the language of the statute committing the action to the discretion of the President rendered the President's action nonreviewable. *Id.* at 476-477. Thus, the statutory commitment of a decision to the President's discretion does not preclude judicial review where a constitutional claim is at stake. *See id.* at 274 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-397 (1971), distinguishing between "actions contrary to [a] constitutional prohibition" and those "merely said to be in excess of the authority delegated...by the Congress").

In fact, the concurring opinions in *Dalton* emphasize that this distinction by the Court specifically preserved the authority of the federal judiciary to review constitutional claims involving authority delegated by statute. Justice Blackmun understood the majority's holding not to preclude a constitutional challenge to an *ultra vires* exercise of the President's authority. *Dalton*, 511 U.S. at 478 (Blackmun, J., concurring). In addition, Justice Blackmun more

specifically described the type of *ultra vires* claim that would not be foreclosed by the majority's decision, writing that judicial review would not be foreclosed of a claim "that the President added a base to the Defense Base Closure and Realignment Commission's list in contravention of h is statutory authority." *Id.* Justice Souter agreed, joining that portion of the majority's opinion "because I think it is clear that the President acted wholly within the discretion afforded him by the Defense Bar Closure and Realignment Act of 1990." *Id.* (Souter, J., concurring, joined by Justices Blackmun, Stevens, and Ginsburg).

Therefore, *Dalton* does not preclude judicial review of *ultra vires* presidential action where that action was completely outside the realm of discretion afforded by the statutory delegation. Rather *Dalton* precludes review of claims based simply on an alleged abuse of the discretion occurring within the confines of the delegation. In other words, *Dalton* precludes claims based on abuse of discretion but does not preclude claims based on the absence of constitutional authority. Contrary to Defendant's arguments, Defs. Stmt. Of Pts. At 21, the *Dalton* case in no way abrogates the jurisdiction of courts to determine whether discretionary action by the President violates his constitutional authority. *See Dalton*, 511 U.S. at 474.

Other cases cited by Defendant, which were cited by the Court in *Dalton* as well, bear out this distinction. In *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919), the Supreme Court held that where the plaintiffs' claims concerned "not a want of [Presidential] power, but a mere excess of abuse of discretion in exerting a power give, it is clear that it involves considerations which are beyond the reach of judicial power." *See Dalton*, 511 U.S. at 474. In *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940), the Supreme Court held that where there was no question that the President "acted in full conformity with the statute," "[n]o question of law is raised when the exercise of

his discretion is challenged." Similarly, in *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 112-114 (1948), the President's discretionary decision within the confines of the statutory scheme was not reviewable.

Dalton provides that when a statute commits a decision or determination to the discretion of the President, the exercise of the discretion is not reviewable for a simple abuse of that discretion. However, *Dalton* does not preclude review of *ultra vires* presidential actions where the President's failure to act within the outer limits of the delegated authority renders the action of the President without constitutional authority. The absence of constitutional or statutory authority for presidential action remains an issue fully addressable by the courts. *Youngstown Sheet & Tube*, 343 U.S. at 582.

Because this case does not raise a statutory claim, but rather is based upon whether or not Defendant complied with a specific constitutional provision, *i.e.*, the Property Clause, in designating the challenged national monuments, *Dalton* is inapposite. Furthermore, because this case concerns not a mere abuse of presidential discretion but rather an absence of presidential authority, *Dalton* is inapposite. This Court has jurisdiction to review Plaintiffs' constitutional claims.

B. This Court Has Jurisdiction To Determine Whether There Is Substantial Evidence To Support The President's Exercise Of The Constitutional Authority Delegated To Him By Congress.

Defendant cites *State of Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945), in support of its argument that Defendant's designation of a national monument under the Antiquities Act constitutes an act of unreviewable discretion. However, *Franke* actually stands for the opposite conclusion. In *Franke*, the State of Wyoming challenged President

Roosevelt's designation of the Jackson Hole National Monument. *Id.* at 892. Like Plaintiffs here, Wyoming asserted, *inter alia*, that the Proclamation creating the monument was without constitutional authority. *Id.* The State also sought invalidation of the Proclamation as outside the scope and purpose of the Antiquities Act because the monument area contained no objects of historic or scientific interest and because it was not confined to the smallest area compatible with the proper care and management of such objects. *Id.*

The court in *Franke* explicitly recognized its jurisdiction to consider whether the President acted outside the scope of the constitutional authority conferred by the Antiquities Act:

> [T]his Court feels that it has a limited jurisdiction to investigate and determine whether or not the Proclamation is an arbitrary and capricious exercise of power under the Antiquities Act so as to be outside the scope and purpose of that Act by which the President in the exercise of its provisions has exceeded or violated a discretion thereby conferred.

Id.

The *Franke* case demonstrates that actions taken pursuant to delegated legislative authority may be reviewed to the extent necessary to ensure that the delegate constitutionally acted within the scope of authority conferred by the delegating statute. Only after concluding that there was a substantial basis in the evidence for the President's establishment of the Jackson Hole National Monument did the district court hold that "under the evidence presented here, the Court cannot interfere." *Franke*, 58 F. Supp. At 896.

The Supreme Court, in *National Broadcasting Co. v. United* States, 319 U.S. 190, 224 (1943), held that the federal judiciary plays its proper role when it determines whether an

exercise of discretion pursuant to delegated authority is lawful. Describing its role in reviewing regulations promulgated by the FCC pursuant to a congressional delegation, the Supreme Court held that the extent of its duty was to determine whether the action of the FCC was based upon "findings supported by evidence" and not the "public interest will be furthered or retarded by the [regulations]." *Id.*

Therefore, this Court may review the factual evidence regarding Defendant's designation of the challenged national monuments in order to determine whether Defendant acted consistently with the grant of congressional authority contained in the Antiquities Act. However, a review of the factual evidence regarding Defendant's designation of the challenged national monuments is a question of fact that is not properly decided on a motion to dismiss. *City Federal Sav. and Loan Ass'n v. Crowley*, 393 F. Supp. 644, 658 (E.D. Wis. 1975).

III. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A. Standard of Review

Defendant and Intervenors move to dismiss this case pursuant Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Defs. Mot. To Dismiss at 1; Interv. Mot. To Dismiss at 1. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1117 (D.C. Cir. 2000).

B. If the Antiquities Act Is Construed As A Delegation Of Unlimited Power Such That All Actions By A President Are Committed To His Unreviewable Discretion, The Act Is

Unconstitutional Under The Non-Delegation Doctrine.

Defendant asserts that Defendant's exercise of discretion in creating the challenged monuments is not judicially reviewable because the Antiquities Act commits the designation of national monuments to the complete and total discretion of Defendant Defs. Stmt. Of Pts. At 21. To the degree that this assertion by Defendant is true, the Antiquities Act violates the nondelegation doctrine.[17]

It is well settled that a delegation of legislative authority with no standards or limits is unconstitutional. *Panama Refining*, 293 U.S. at 430; *Yakus*, 321 U.S. at 426. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art I, § 1. It is from this language that the Supreme Court has derived the nondelegation doctrine, which provides that Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160, 165 (1991). "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 371 (1989)).

Although the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limited, from the other branches of government, in order to do so, Congress must "lay down by legislative act an intelligible principle to which the person authorized to [act] is directed to conform." *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). Thus, a delegation of authority by a statute that fails to supply such an "intelligible

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[17] Defendant concedes that this Court has jurisdiction to review the constitutionally of the Antiquities Act under the nondelegation doctrine. Defs. Stmt. Of Pts. At 16-17.

principle" is an unconstitutional delegation of legislative authority. *Id.*[18]

1. The Antiquities Act improperly delegated to the President all powers possessed by Congress.

To the extent that Defendant argues that Defendant's exercise of discretion under the Antiquities Act is judicially unreviewable, Defendant asserts that the Antiquities Act is without limits. Because Defendant asserts that the Antiquities permits Defendant to designate any federal land as a national monument, the Antiquities Act violates the nondelegation doctrine because it improperly delegates to the President all the power possessed by Congress as to federal lands.[19] This Congress may not do.

Although Congress may delegate its power by "laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply," *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), that delegation may not be without limits.

As the Supreme Court recognized, the regularity with which Congress has delegated its power "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Id.* In determining whether Congress had adhered to the commands of the Constitution in delegating its power to the Executive:

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[18] This doctrine is "by no means repudiated," particularly in this circuit. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996).

[19] The Property Clause provides, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, sec. 3, cl. 2.

> [W]e look to the statute to see whether the Congress had declared a policy with respect to that subject whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to act the prohibition.

Id. at 41. Thus, the key inquiry is whether Congress "has itself established the *standards of legal obligation,* thus performing its *essential legislative function*, or, by the failure to enact such standards, has attempted to transfer that function to others." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). Under the view of the Antiquities Act propounded by Defendant, there are no "standards of legal obligation." As a result, the Antiquities Act fails under the nondelegation doctrine just as the National Industrial Recovery Act (NIRA) failed. The challenged statutory provision in *Panama Refining*, Section 9(c) of the NIRA, reads very similarly to the Antiquities Act:

> The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any...State.

Id. at 406 (quoting 15 U.S.C. § 709(c)).

However this "brief and unambiguous" grant of congressional authority was held to be unconstitutional because it failed to provide "whether or in what circumstances or under what conditions" the President was authorized to take action and because it "establishe[d] no criterion to govern the President's course." *Panama Refining*, 293 U.S. at 415. In fact, Congress "declares no policy" giving "to the President an unlimited authority to determine the policy and to [take action], or not to [take

action], as he may see fit." *Id.* Moreover, in *Panama Refining*, the Act "simply defines the subject of the prohibition which the President is authorized to enact or not to enact as he pleases." *Id.* at 420. "Congress left the matter to the President without standard or rule [and "without limits or controls"], to be dealt with as he pleased." *Id.* at 419.

But under the interpretation of the Antiquities Act as set forth by Defendant that is what Congress did by its adoption of the Antiquities Act. As the Supreme Court recognized in *Panama Refining*, 293 U.S. at 432, a failure to require Defendant to comply with congressional conditions an prerequisites to the exercise of the delegated authority "would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power." If Defendant has total discretion under the Antiquities Act and any action taken under that Act is completely unreviewable, the Antiquities Act effectively invests Defendant with "uncontrolled legislative power" over federal lands, which is, pursuant to the Property Clause, the sole responsibility of Congress. *Id.* Because, under the interpretation advanced by Defendant, the Act "declares no policy" and gives "to the President an unlimited authority to determine the policy and to [take action], or not to [take action], as he may see fit," the Antiquities Act is unconstitutional. *Id.* The Act grants to Defendant complete and unlimited discretion, "simply defin[ing] the subject of the prohibition which the President is authorized to enact or not to enact as he pleases." *Id.* at 420. Such a delegation is not constitutionally permissible. *Id.* Defendant and Intervenors' Motion to Dismiss must be denied.

2. Broad delegations of congressional power have been upheld only where Congress has performed its essential legislative function.

The Supreme Court has upheld the delegation of congressional power to the Executive only when that grant of power did not "in any real sense, invest the president with the power of legislation" because "[action to be taken by the President] was absolutely required when the president ascertained the existence of a particular fact." *Panama Refining*, 293 U.S. at 426. Thus, it could not be said that the President "exercised the function of making laws," rather he "was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will laws to take effect." *Id., see Yakus v. United States,* 321 U.S. 414 (1944).

Under *Yakus*, both "statutory standards and declaration of policy," in the form of a "rule" or "statutory standards and declaration of policy," in the form of a "rule" or "statutory command" as well as "standards" to be followed, are necessary in order for a court to determine "whether the will of Congress has been obeyed." *Yakus,* 321 U.S. at 424-25. In *American Power & Light Co. v. Securities Exch. Comm'n,* 329 U.S. 90, 105 (1946), the Supreme Court held that Congress must clearly delineate "the general policy" as well as the "boundaries of [] delegated authority" because it is impossible to determine whether the will of Congress has been obeyed where Congress has provided criteria for discretionary action but has failed to provide when that discretion should be exercised.

For example, in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 214-15 (1989), the Supreme Court held that, under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), Congress had confined the Secretary of Transportation's discretion with rather specific criteria and had provided the "general rule" or "command," which was that pipeline safety user fees be established and collected. *Id.* at 214-15.

Recently, in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. ---, 121 S. Ct. 903, 913 (2001), the Supreme Court upheld the delegation of legislative authority in the Clean Air Act, by which Congress instructed the Environmental Protection Agency to set ambient air quality standards at a level that is "requisite to protect the public health" with "an adequate margin of safety." The Supreme Court held that the delegation was sufficiently similar to others that have been upheld, citing various precedents in which the legislative policy could be ascertained. *Id.* at 912 (citing *Touby, Yakus,* and *National Broadcasting*).[20]

Under the view of the Antiquities Act propounded by Defendant, the Antiquities Act fails to provide the requisite "statutory command" for the President's discretion sufficient to constitute an "intelligible principle" by which a court may determine "whether the will of Congress has been obeyed." *See, Yakus*, 321 U.S. at 425, *Touby*, 500 U.S. at 165, 168. Because the Antiquities Act assigns to the President the performance of an "essential legislative function," a legislative function that under the Property Clause is the exclusive province of Congress, the delegation of that legislative authority is unconstitutional. Therefore, because Defendant had no authority to issue the challenged proclamations, Defendant acted in violation of the Property Clause in designating the Grand Canyon-Peasant, Canyons of the Ancients, Cascade-Siskiyou, Hanford Reach,

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[20] Noting that the Constitution requires that "[a]ll legislative Powers" shall be vested in Congress, Justice Thomas concluded that improper delegation of the essential legislative function can occur even when a delegation contains "intelligible standards." *American Trucking*, 531 U.S. at ---, 121 S. Ct. at 920 (Thomas J., concurring). "I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.*

Ironwood Forest, and Sonoran Desert National Monuments.[21]

C. The Monument Proclamations Violate Clearly Expressed Congressional Intent.

1. The will of Congress with regard to the designation of national monuments is clearly expressed in the statutory language.

The Antiquities Act provides:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

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[21] The cases cited to by Defendant (*Cameron v. United States*, 252 U.S. 450 (1920); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. California*, 436 U.S. 32 (1978)) are of no precedential value because the nondelegation issue was not addressed in those cases. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1954) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point ."); *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1331 n.1 (Fed. Cir. 1998) ("Because the issue of preemption was not addressed, this [line of] precedent is of little value to us in deciding this appeal."); *United States v. Ursery*, 59 F.3d 568, 575 n. 6 (6th Cir. 1995) ("the fact that the Court did not address the [issue] simply has no precedential value in this case.").

16 U.S.C. § 431.

On its face, the plain language of the Antiquities Act clearly expresses congressional intent with regard to the objects to be protected under the Act. The Act specifically limits the designation of national monuments to "historic landmarks, historic and prehistoric structures, and other *objects* of historic or scientific interest that are *situated upon* the [public] lands." *Id.* (Emphasis added). The language of the Act thus reveals congressional intent to preserve ruins, artifacts, and other man-made objects on the land, and not the land itself.

Congress also provided that the limits of national monuments "in all cases shall be confined to the smallest area" possible allowing for the protection of the historic ruins and relics. By including this language in the statute, Congress declared its intent that the reservations of public land surrounding the monuments were to be relatively small in size, and only so large as necessary for the protection of each individual object deemed worthy of national monument protection.

Therefore, the brief but plain language of the Antiquities Act clearly envinces congressional intent to protect individual man-made objects with historic or scientific qualities deserving of preservation surrounded by the smallest possible reservation of public lands necessary for protection of the monument.

2. The will of Congress with regard to the designation of nation monuments is clearly expressed in the legislative history of the Antiquities Act.

The legislative history of the Antiquities Act makes it clear that what Congress intended to protect as national monuments were rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts. The early

legislative history reveals that Congress had a limited purpose in mind: the protection of small areas in the southwest United States containing prehistoric ruins and Indian artifacts. H.R. Rep. NO. 56-1104 (1900) (discussing a bill "for the preservation of prehistoric monuments, ruins, and objects on public lands"). Congress determined the only practical way to preserve these ruins was "by creating reservations of the land surrounding each ruin" and penalizing those who would vandalize or destroy the ruins. *Id.*

After several drafts, the Antiquities Act was passed in 1906. The House Committee on Public Lands explained:

> There are scattered throughout the Southwest quite a large number of very interesting ruins. ... The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.

H.R. Rep. No. 5902224 (1906). Similarly, in recommending passage of the bill, the Report of the Senate Committee on Public Lands referred to the importance of preserving "historic and prehistoric ruins and monuments" and noted that the "bill is carefully drawn." S. Rep. No. 59-3797 (1906). As evidenced by this legislative history, the House and Senate committees with jurisdiction over the bill did not ascribe much significance to the phrase "other objects of historic or scientific interest" and did not anticipate the expansive interpretation that would later be given to that phrase by Defendant.

In the early years of the bill's consideration, the Interior Department proposed legislation authorizing the President to set aside areas "for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest." Lee, Ronald F., *The Antiquities Act of 1906*, at 52-55 (Nat'l Park Svc. 1970).

The House committee rejected such a broad grant of executive authority, *id.* at 55, and specifically omitted any reference to "scenic beauty" and "natural wonders." *Id.* at 68-71.

The legislative history clearly reveals that scenic beauty and natural landforms were not to be a basis for monument designation.[22] Rather, the Act was intended to protect man-made objects "situated upon" the public lands and not the public lands themselves. 16 U.S.C. § 431.

The floor debate on the bill only reinforces congressional intent not to grant broad withdrawal authority to the President by way of the Antiquities Act. Representative Lacey, chairman of the House public Lands Committee stated that the bill "will merely make small reservations where the objects are of sufficient interest to preserve them." 40 Cong. Rec. 7888 (1906). Rep. Lacey further stated that the bill "is meant to cover the cave dwellers and cliff dwellers." *Id.* Rep. Stephens of Texas, expressing concerns about the scope of the bill, questioned, "How much land will be taken off the market in the Western States by passage of the bill?" *Id.* Rep. Lacey responded, "Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved." *Id.* Assuring Rep. Stephens that the Act would not be anything like the forest-reserve bill, "by which seventy or eighty million acres of land in the United States have been tied up," Rep. Lacey confirmed that "[t]he object is entirely different. It is to preserve these old objects of special interest and the

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[22] Acknowledging this history, Frank Bond, the Chief Clerk of the General Land Office, stated at a National Park Service conference in 1911, "The terms of the monument act do not specify scenery, nor remotely refer to scenery, as a possible *raison d'etre* for a public reservation." Lee, *The Antiquities Act of 1906*, at 109.

Indian remains in the pueblos of the Southwest, whilst the other reserves the forests and the water courses." *Id.*

It is beyond doubt that Congress never intended or anticipated the use of the Antiquities Act to designate national monuments of the purpose, scope, and size of the six monuments challenged in this case. In this case, Defendant withdrew and set aside over 2,040,000 acres of public land totally contrary to the limited constitutional authority granted to him by the Antiquities Act. The fact that Congress never intended this result under the Antiquities Act is particularly clear give Congress' reassertion of its Property Clause authority in the enactment of the Federal Land Policy and Management Act (FLPMA) and the attendant narrowing of Executive authority with regard to federal property issues. *See* 43 U.S. C. § 1701(4). Accordingly, following Congress' enactment of FLPMA, the Antiquities Act must be interpreted strictly in accordance with its original intent. *Id.*

3. The monument Proclamations facially defy the expressed intent of Congress.

The Antiquities Act itself and the legislative history of that Act demonstrate that Congress never contemplated federal lands would be designated as monuments for the purposes of scenic beauty, natural wonders, geologic formations, forests, rivers, plants, animals or any other aspect of nature. Rather, Congress enacted the Antiquities Act solely for the protection of ruins, relics, and other man-made objects of historic or scientific interest, to be surrounded by a small reservation of land as necessary to prevent vandalism and the destruction of those ruins, relics, and other man-made objects. Because the Proclamations designating the monuments challenged in this case purport to protect as national monuments various aspects of scenery, landscape, and nature, the monument designations are contrary to the clearly expressed will of Congress and are

unconstitutionally in excess o f the narrow grant of legislative authority intended by Congress.

The Proclamation establishing the Grand-Canyon Parashant National Monument purports to protect, *inter alia*, landscape, scenery, "natural splendor and a sense of solitude," rocks, canyons, mountains, cliffs, vistas, ecosystems and wildlife, including threatened or endangered species.[23] 65 *Fed. Reg.* 2825, 2825-2827 (January 11, 2000). The Proclamation establishing the Canyons of the Ancients National Monument purports to protect, *inter alia*, rugged landscape, natural resources, cliffs, canyons, "spectacular land forms," and crucial habitat for wildlife.[24] 65 *Fed. Reg.* 37243, 37243-37244 (June 13, 2000). The Proclamation establishing the Cascade-Siskiyou National Monument purports to protect, *inter alia*, forests and groves, "wildflower-strewn meadows," canyons, geologic formations, ecological wonders, and a "spectacular variety of rare and beautiful species of plants and animals." 65 *Fed. Reg.* 37249, 37249 (June 13, 2000). The Proclamation establishing the Hanford Reach National Monument purports to protect, *inter alia*, landscape, ecosystems, riparian and aquatic habitat, "uncommon native plant and animal species," insects, "fragile macrobiotic crusts," and a stretch of the Columbia River.[25] 65 *Fed. Reg.* 37253, 37253-37254 (June 13, 2000). The Proclamation establishing the Ironwood Forest National Monument purports to protect, *inter alia*, desert vegetation, forests, mountain ranges,

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[23] The Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, contains the sole delegation of congressional power as to the manner in which threatened and endangered species are to be protected.

[24] *See* fn. 9, *supra*, as to the ESA.

[25] The Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*, sets forth the manner in which Congress will protect rivers.

threatened or endangered species and habitat,[26] and a "quintessential view of the Sonoran Desert." 65 *Fed. Reg.* 37259, 37259 (June 13, 2000). Similarly, the Proclamation establishing the Sonoran Desert National Monument purports to protect, *inter alia*, desert landscape, desert ecosystems, mountain ranges, cactus forests, wildlife and habitat, natural water holes, and "patches of desert grassland." 66 *Fed. Reg.* 7354, 7354-7355 (January 17, 2001).

Although each of the Proclamations, with the exception of the Cascade-Siskiyou Proclamation, eventually describes in very general terms an abundance or collection of archaeological sites or artifacts, the Proclamations do not identify any particular ruin or artifact to be specifically protected by the monument reservation. The Cascade-Siskiyou Proclamation makes no reference historic ruins or artifacts, but briefly refers to portions of an historic trail. The Proclamations create national monuments ranging in size from 52,000 to 1,014,000 acres.

Judicial review by this Court of Defendant's Antiquities Act designation of the six national monuments challenged here is essential to ensure that "the will of Congress is obeyed." *Touby*, 500 U.S. at 1757. Judicial examination of Defendant's actions in this case is necessary to ensure compliance with the limited grant of congressional power delegated to Defendant by Congress. This Court has jurisdiction to review Defendant's designation of the challenged national monuments for compliance with congressional intent as expressed in the language and legislative history of the Antiquities Act.

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[26] *See* fn. 9, *supra*, as to the ESA. In addition, the ESA contains the sole manner in which habitat for threatened or endangered species may be protected.

CONCLUSION

For the foregoing reasons, Defendant's and Intervenors' Motions to Dismiss must be denied.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument on this matter because this case concerns unique and precedent-setting issues of nationwide significance. Oral argument would benefit the Court in this matter of critical constitutional importance and would serve the interests of justice.

DATED this 12th day of April, 2001.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 22 2003
OFFICE OF THE CLERK

No. 02-1590

In The
Supreme Court of the United States

MOUNTAIN STATES LEGAL FOUNDATION and THE BLUE RIBBON COALITION, INC.,

Petitioners,

v.

GEORGE W. BUSH, President of the United States; THE WILDERNESS SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; SODA MOUNTAIN WILDERNESS COUNCIL; and NATIONAL WILDLIFE FEDERATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS[1]

I. MSLF'S COMPLAINT CONTAINED SUFFICIENT FACTUAL ALLEGATIONS TO PROVIDE "FAIR NOTICE" OF THE BASIS OF MSLF'S CLAIMS.

Paragraphs 1, 36-80, Petitioners' Appendix (Pet. App.) 36, 44-50, of the complaint are factual allegations that set forth the bases of Mountain States Legal Foundation's (MSLF's) claims, describing in detail the presidential actions challenged as *ultra vires*. It is therefore untrue that MSLF "has failed to present any factual allegation sufficient to warrant review of its *ultra vires* claim." *Mountain States Legal Foundation, et al. v. Bush*, 306 F.3d 1132, 1133 (D.C. Cir. 2002), Pet. App. at 2; *see also*, Wilderness Society Opposition (Wilderness Opp.) at 16.

MSLF described in detail the presidential actions being challenged and stated that the President lacked authority for those actions – constitutional or statutory – thus stating a claim of *ultra vires* executive action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952); Complaint ¶¶ 36-104, Pet. App. 44-54. In *Youngstown*, as here, the text of the challenged Executive Order contained the purported authority for the presidential action. *Id.* at 584; *see* Executive Order No. 10340 (April 8, 1952). Nevertheless, as here, the plaintiffs' complaint simply charged that the President's action "was not authorized by an act of Congress or by any constitutional

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[1] No publicly-held company holds a 10% or greater ownership interest in Mountain States Legal Foundation or Blue Ribbon Coalition, nor does either of these entities have parent companies.

provisions." *Id.* at 583. As here, the President responded, asserting various bases for his authority to issue the Executive Order. *Id.* at 584. Then, in the first round of briefing and thereafter, plaintiffs had the opportunity to set forth arguments demonstrating why the President's action did not fall within each of the asserted bases for authority. *Id.* Thereafter, the courts, including this Court, proceeded to consider whether the President's action fell within any of the asserted sources of authority. *Id.* at 585-589. Therefore, MSLF's complaint, just as did the complaint in *Youngstown*, stated an *ultra vires* claim that is properly subject to review by the courts.

Furthermore, MSLF's complaint was improperly dismissed by the D.C. Circuit for "fail[ure] to present any factual allegation sufficient to warrant review" because the issue regarding sufficiency of the pleadings under Fed. R. Civ. P. 8 is "fair notice." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Because MSLF alleged that the President's designation of each of the challenged monuments was "unconstitutional and *ultra vires*," Respondents clearly had "fair notice" that the President's authority for those actions was being challenged. Respondents did, in fact, receive "fair notice" because they promptly raised the Antiquities Act, 16 U.S.C. § 431, as authority for the challenged designations. Pres. Br. Mot. to Dismiss at 1; Interv. Br. Mot. to Dismiss at 1.

The Wilderness Society relies on *Associated Gen. Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983), for the proposition that the court cannot assume that defendants have violated the law in ways that have not been alleged. However, *Associated General* was not a "fair notice" case. Rather, the allegations in that case failed as a matter of standing and

antitrust law and the court could not assume any fact scenario different from the one alleged. *Id.* at 526-527, 545-546. But here, where the allegations do not fail on their face as a matter of substantive law, the issue is not whether MSLF could have alleged other facts sufficient to satisfy the substantive legal standards but whether Respondents received "fair notice" of the bases of MSLF's claims, which they clearly did. Moreover, because MSLF's claims were based on a lack of authority for the challenged actions, MSLF could not be expected to know at the outset the facts that would be necessary to rebut the President's asserted authority.

Because all parties had "fair notice" of the bases of MSLF's claims and the case proceeded accordingly, the D.C. Circuit's decision that the complaint failed to satisfy notice pleading standards is in conflict with decisions of this Court regarding notice pleading requirements.

This Court should grant the Petition to resolve this conflict.

II. JUDICIAL REVIEW IS AVAILABLE TO ENFORCE THE LIMITATIONS ON PRESIDENTIAL AUTHORITY CONTAINED IN THE ANTIQUITIES ACT.

The President argues that MSLF is not entitled to judicial review of its *ultra vires* claims by mischaracterizing them as claims based on abuse of discretion. President's Opposition (Pres. Opp.) at 8. The Wilderness Society similarly attempts to draw a distinction between statutory and *ultra vires* claims, relying on *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), to mischaracterize MSLF's claims as "claim[s] of error in the exercise

of [delegated] power." Wilderness Opp. at 13-14. Moreover, by arguing that MSLF's claims are non-reviewable because presidential action may not be reviewed for abuse of discretion, Respondents ignore a key distinction between the type of judicial review prohibited in *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), and the type of judicial review permitted here.

When there are specific statutory limitations on executive authority, as in the Antiquities Act, this Court has held consistently that judicial review is available to ensure compliance with those limitations. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986); *Leedom v. Kyne*, 358 U.S. 184, 188-190 (1958); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902).

For example, in *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1322-1339 (D.C. Cir. 1996), the D.C. Circuit undertook review of President Clinton's Executive Order barring the federal government from contracting with employers who hire permanent replacement workers during a lawful strike, concluding that the President's Executive Order violated the National Labor Relations Act. The D.C. Circuit specifically refused to adopt the proposition, advanced by the President in that case and advanced by the President here, that the President's broad authority under the Procurement Act precluded judicial review of executive action for conformity with that statute. *Id.* at 1331. Rather, the D.C. Circuit held, based on *Bowen*, *McAnnulty*, *Stark*, and *Leedom*, that the broad discretion vested in the President by the Procurement Act does not preclude judicial review of presidential action for

conformity with that Act or with any other statute. *Id.* at 1327-1332.

Similarly, in *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (*en banc*), the D.C. Circuit substantively reviewed presidential action, concluding that President Carter's Executive Order denying government contracts to companies that fail or refuse to comply with voluntary wage and price standards was within the authority delegated by the Procurement Act. Though the Procurement Act vests broad discretion in the President to prescribe policies and directives "as he shall deem necessary to effectuate the provisions of the Act," the D.C. Circuit nevertheless examined the President's action to determine whether it, in fact, accomplished the statutory goals of "economy" and "efficiency." *Id.* (quoting 40 U.S.C. §§ 471, 486(a) (1986)). Therefore, even when the President is acting pursuant to a statute that grants broad discretion, the courts will not shirk their duty to demand that the President act in full compliance with the commands of the statute. *Reich*, 74 F.3d at 1330; *Bowen*, 476 U.S. at 681.

However, in *George S. Bush & Co.*, 310 U.S. at 380, the Tariff Act explicitly committed to the discretion of the President the judgment regarding the existence of facts necessitating presidential action.[2] The statute contained

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[2] The Tariff Act of 1930 provided that the President:

> shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, *if in his judgment such rates of duty changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.*

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no objective standards with which any court could measure the President's compliance with the federal statute. *Id.* Thus, because Congress had committed the decision solely to the discretion of the President and had deprived the courts of any standard by which to review the President's decision, this Court held that it could not review the substance of the President's decision. *Id.*

Dalton v. Specter, 511 U.S. 462 (1994), is similarly distinguishable from this case. In *Dalton*, this Court refused to review the President's action under the Defense Base Closure and Realignment Act of 1990 because the Act did "not at all limit the President's discretion in approving or disapproving the Commission's recommendations" regarding challenged base closures. *Id.* at 476; *see also*, *Reich*, 74 F.3d at 1331 (distinguishing *Dalton*).[3]

George S. Bush, 310 U.S. at 376-377 (quoting 19 U.S.C. § 1336(c)) (emphasis added).

[3] The President argues that *certiorari* should be denied because judicial process is unavailable against the President. Pres. Opp. at 5-6. In *Dalton*, this Court expressed some hesitancy regarding non-statutory review of presidential action but declined to address the question, assuming "that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the [Administrative Procedure Act]." *Dalton*, 511 U.S. at 474. However, it is "settled law" that the Separation of Powers Doctrine does not bar every exercise of jurisdiction over the President; when judicial action is needed "to serve broad public interests," as here, "the exercise of jurisdiction has been held warranted." *Nixon v. Fitzgerald*, 457 U.S. 731, 753-754 (1982). Moreover, concerns about subjecting the President to judicial process are lessened when only declaratory and injunctive relief is sought regarding the President's nondiscretionary compliance with law. *See United States v. Burr*, 25 F. Cas. 187, 191, 196 (CC Va. 1807).

The D.C. Circuit correctly recognized that "*Reich* is instructive" regarding this case because "the same policy considerations apply," that is, because the Antiquities Act contains specific limitations on the President's authority under that Act.[4] *Mountain States*, 306 F.3d at 1136, App. 9. The President's compliance with these limitations is reviewable to determine whether the Antiquities Act may serve as valid authority for the President's designation of the challenged monuments. Accordingly, the President's argument that *certiorari* should be denied because MSLF's claims are unreviewable notwithstanding the sufficiency of the complaint fails.[5]

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[4] The President also argues that MSLF has failed to provide a statutory waiver of sovereign immunity and cause of action permitting judicial review of the President's action. Pres. Opp. at 8-9; *see also*, Wilderness Opp. at 13-14. However, relying on *Larson*, the D.C. Circuit specifically rejected this argument in *Reich*, 74 F.3d at 1329, noting that "[a]lthough the government's brief advanced a breathtakingly broad claim of non-reviewability of presidential actions, the government does not seriously press its argument that we may not exercise jurisdiction over appellants' claim because they lack a cause of action or cannot point to a waiver of sovereign immunity." Sovereign immunity is not a bar to judicial review of MSLF's claims.

[5] Respondents raise the argument that the Antiquities Act is a constitutional delegation of legislative authority. Pres. Opp. at 6; Wilderness Opp. at 6-7. MSLF has not disputed that the Antiquities Act contains the requisite "intelligible principles" but rather has argued that, absent meaningful enforcement of those limitations on executive authority, the Antiquities Act would constitute an unlimited and, therefore, unconstitutional, delegation of congressional authority with respect to federal lands. Opening Brief on appeal at 25-28. Nevertheless, MSLF declined to petition for *writ of certiorari* on this issue because it did not form the basis of the D.C. Circuit's decision dismissing the complaint. Likewise, MSLF declined to petition this Court regarding use of the Antiquities Act to protect natural objects because

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This Court should grant the Petition.

CONCLUSION

For all of the above reasons, this Court should grant the Petition.

Respectfully submitted,

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Dated: July 22, 2003

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that issue did not form the basis of the D.C. Circuit's decision. *See* Pres. Opp. at 6-7; Wilderness Opp. at 8-12.